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ORDINANCE

City of Miami Code, Ch. 43, Sec. 38 ..... 4 et. seq:

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No.

MARCEL FORT,

Petitioner,

vs.

THE CITY OF MIAMI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal for the Third District of Florida entered in the above-entitled cause on January 18, 1967.

OPINIONS BELOW

The finding of guilt by the Municipal Court of the City of Miami was accompanied by no opinion; the trial court's ruling is set forth in the "Statement of the Case" infra. The Judgment of Affirmance of the Circuit Court

of the Eleventh Judicial Circuit in and for Dade County, Florida, is unreported and appears as Appendix B,* infra. The Judgment of the District Court of Appeal of Florida, Third District, denying certiorari is as yet unreported and appears as Appendix A, infra.

JURISDICTION

The final judgment of the Florida District Court of Appeal was entered on January 18, 1967 (Tr. 215, App. A). The jurisdiction of this Court is invoked under Title 28, United States Code, sec. 1257(3), petitioner having asserted in the courts below rights to freedom of expression conferred by the Fourteenth Amendment to the Constitution of the United States.

The Florida District Court of Appeal, in denying the petition for common-law certiorari, effectively affirmed the judgment below (upholding petitioner's conviction under a City of Miami Ordinance for possessing obscene sculpture with intent to sell it) by holding that the decision of the Circuit Court did not deviate from essential requirements of law. See **Dresner v. City of Tallahassee**, Fla. 1964, 164 So. 2d 208, 210 and **Ellison v. City of Fort Lauderdale**, Fla. 1966, 183 So. 2d 193, 194. Said Florida District Court of Appeal is the highest state court in which a decision could be had in the case at bar since neither appeal nor certiorari lies to the Florida Supreme Court under Art. 5 sec. 4(2) of the Florida Constitution and Florida Appellate Rules #2.1a (5)(b) and 4.5c (6), and the Florida Supreme Court is no longer empowered to issue writs of common-

*"App." symbolizes Appendix herein and "Tr" the Certified Transcript accompanying the Petition for Certiorari. All emphasis in quoted material is provided by counsel unless stated otherwise.

law certiorari. See **Dresner v. City of Tallahassee, supra,** at 210, **Robinson v. State,** Fla. 1961, 132 So.2d 3, 5, and **Callendar v. State,** Fla. 1966, 181 So. 2d 529, 532.

QUESTIONS PRESENTED

1. WAS THE MIAMI ORDINANCE PROHIBITING THE POSSESSION-OF-OBSCENE-STATUES, ETC. UNCONSTITUTIONALLY APPLIED TO PETITIONER AS THE STATUES IN QUESTION ARE NOT OBSCENE AND ARE PROTECTED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

2. IS THE MIAMI ORDINANCE UNCONSTITUTIONAL ON ITS FACE UNDER THE FOURTEENTH AMENDMENT WITH REFERENCE TO THE LIMITED "APPEAL TO PRURIENT INTEREST" TEST FOR DETERMINING OBSCENITY?

3. IS THE MIAMI ORDINANCE UNCONSTITUTIONAL ON ITS FACE AND/OR WAS IT UNCONSTITUTIONALLY APPLIED UNDER THE FOURTEENTH AMENDMENT WITH REFERENCE TO THE SEIZURE AND CONFISCATION OF THE STATUES WITH NO WARRANT, ADVERSARY PROCEEDING, OR JUDICIAL DETERMINATION OF OBSCENITY?

ORDINANCE INVOLVED

The Ordinance involved, City of Miami Code Ch. 43, sec. 38, states as follows:

> "It shall be unlawful to commit, within the limits of the city, any act which is recognized by the laws of the state as a misdemeanor set out in Florida Statutes, excepting therefrom those misdemeanors set out in Chapter 855 of Florida Statutes, 1957."
>
> (Code, 1945, ch. 35, sec. 36; Ord. 5493 sec. 1, 1-4-56).

Florida Statutes, sec. 847.011 (Laws 1961, c. 61-7, secs. 1-11) is lengthy and is set forth **in toto** in Appendix C, **infra.** Subsection (1)(a) makes it a misdemeanor to distribute obscene materials or to have them in one's "possession, custody, or control with intent to sell." Subsection (6) negates any right of property in materials possessed in violation of the section, directs law enforcement officers seizing obscene materials to deliver them to the trial court, and compels destruction of materials found to violate the section. Subsection (10) states as follows:

> "For the purposes of this section the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

STATEMENT OF THE CASE
Proceedings Below

The case at bar began on August 11, 1965, when Petitioner Fort was arrested for allegedly violating the City of Miami Code, Ch. 43, sec. 38 (which adopts Florida Statute Sec. 847.011[1], by knowingly having in his possession, custody or control with intent to sell obscene or lewd and lascivious figures or images (Tr. 27, 199). The arrest was made without a warrant and solely on the basis of the arresting officers' opinion that six statues sculpted by Petitioner and exhibited for sale in his back yard were obscene (Tr. 41 et. seq.).

At the time of the arrest, the six statues were confiscated and delivered to the Property Bureau of the Police Station (Tr. 55). The confiscation also took place without a warrant; no judicial determination of the alleged obscenity of the statues was made until defendant's trial, for violating the Miami Ordinance, three weeks after the confiscation (Tr. 199).

Petitioner Fort pleaded Not Guilty (Tr. 27, 199) and the case came to trial on September 1, 1965 before the Honorable Arthur Massey, Municipal Judge of the City of Miami Municipal Court (Tr. 24 et. seq.). Testimony and exhibits presented are discussed in the "Summary of Evidence," **infra.**

The trial court found Petitioner guilty of violating the Ordinance and imposed a one hundred dollar fine

[1]City of Miami Code, Ch. 43, sec. 38, is hereinafter referred to as "the Miami Ordinance" and said Ordinance's adoption or incorporation of Florida Statutes Sec. 847.011 is automatically understood.

(Tr. 194-195, 199) or, in default of payment, imprisonment in the City Jail for 40 days (Tr. 199).

Petitioner appealed to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida (Tr. 19-23, 200) which affirmed the judgment below (Tr. 202).

Petitioner petitioned the District Court of Appeal, Third District of Florida, for a writ of common law certiorari (Tr. 205-214). Said court denied certiorari on January 18, 1967 (Tr. 215).

Pursuant to the parties' stipulation, the Florida District Court of Appeal (1) ordered the existing Bond continued in force throughout proceedings in this Court and (2) permitted removal from the Court file of the original photographs of the statues as well as of three of the statues themselves for inclusion in the record before this Court, counsel for Petitioner being "charged with the duty" of having said photographs and statues returned to the Florida District Court of Appeal following this Court's final determination in the certiorari proceedings (Tr. 216).[2]

Summary of Evidence

1. The City's Case

The City of Miami produced only two witnesses at trial, Sergeant Quinn and Policeman Matta, the arresting

[2]Petitioner is forwarding to this Court the Certified Transcript (including poor copies of the photographs). The Clerk of the District Court of Appeal has elected to forward the original photographs directly to the Supreme Court of the United States. The three statutes will be sent to this Court as soon as Petitioner and Respondent can make the necessary arrangements.

officers, who were present at the simultaneous confiscation of the statues. The City introduced into evidence twelve (12) photographs of the statues taken at the scene of the arrest by a city employee (City's Exhibit #1, Tr. 45, 53-56) and the six statues themselves (City's Exhibits #2, 3, 4, 5, 6 and 7, Tr. 96). It should be noted that all testimony at trial referring to the statues as #1, 2, 3, 4, 5, and 6 refer to City's Exhibits #2, 3, 4, 5, 6, and 7 respectively, i.e., the number used by the witness is one less than the official "City's Exhibit" number of each statue.

Sergeant Quinn testified that he arrested Petitioner on August 11, 1965 because, in his opinion, the six life-size statues lined up on Petitioner's lawn, his backyard behind his home at the intersection of South Dixie Highway and Bridgeport Avenue, were pornographic (Tr. 42, 44, 46, 52, 181). The statues were in a 25 foot by 50 foot area with a sign at each end saying "Art for Sale. $25 and up" (Tr. 44). The statues were 50 to 75 feet from the edge of the highway (Tr. 42) and "they were fully exposed to the highway" (Tr. 44, 52). After "qualifying" himself solely on the basis of his age, 45, and his 15 years on the police force (Tr. 42)[3], Sergeant Quinn described each statue in terms of sexual relations, practices, and/or organs (Tr. 47-52). He deemed the statues pornographic because "When I got there, there were little girls looking at them and I ran them off for that reason" (Tr. 46). Pictures were taken of the statues (Tr. 54-56, City's Exh. #1). The statues were then confiscated in Sergeant Quinn's presence and delivered to the Property

[3]Over Petitioner's objection, such qualification was held sufficient. Counsel for the City stated as follows: "He established his qualifications. He is an adult and an experienced police officer . . . That is the basis of qualifying. Why should it be any more?" (Tr. 56)

Bureau of the Police Station (Tr. 55). (The statues were admitted into evidence at trial, Tr. 55-56, 96, forwarded to the Circuit Court as part of the record on appeal, and to the District Court of Appeal on certiorari, Tr. 203-204; three of the statues will be forwarded to this Court shortly, Tr. 216).

Cross-examination elicited the following testimony concerning Sergeant Quinn's qualifications, "expert" opinion, and basis for such opinion. Sergeant Quinn either "read" or "saw" the statue in question prior to the arrest (Tr. 57, 58) but he did not know if it included a test for determination of what is obscene or not (Tr. 58, 59). To his mind, however, "there was a test" which he used as follows:

> "There was a young girl looking at it. It embarrassed me and I asked her to leave and I thought of my own 12-year-old daughter looking at it and that was the test. That made me believe that I did not want any children looking at it." (Tr. 59)

Another part of the arresting officer's test was his "personal opinion" that the statues "definitely... should not be in public" (Tr. 59, 60). An additional test Sergeant Quinn applied was "just thinking about what the artist had on his mind," something Quinn "knew," something which was "obvious" to him (Tr. 62). Sergeant Quinn's art experience was limited to a high school art-appreciation course. He had seen pictures of statues by Michelangelo, but he had never heard of his "David" nor seen a picture of it, nor had he seen pictures of any sculpture by Rodin (Tr. 60, 61, 64). The only statues he had seen

were "(s)ome religious statues," and he could not "recall which ones" (Tr. 64). Sergeant Quinn did not know what books are for sale on Dade County bookstands, and had never read books like "Candy" or "A River of Lions"; he started to read "Tropic of Cancer" but stopped as it was "obscene" and "not worth reading" (Tr. 71-72). He was unfamiliar with "Pleasure Was My Business," "The Memoirs of Fanny Hill" and "The Perfumed Garden" and was unaware that any of these books were on sale throughout Dade County (Tr. 73). He was not familiar with the book "Kama Kala" (Tr. 72-73). He was similarly unfamiliar with "The Circle of Love" and other movies in the Miami area (Tr. 76-77). Sergeant Quinn, a Catholic, admitted that his "knowledge of the community would be restricted to the Catholic Church area where there are limitations on what you can read and see as far as movies" (Tr. 74-76). Sergeant Quinn testified that in the phrase "contemporary community standard" the word "community" refers to "the people that made up the City of Miami" and the word "contemporary... means things that are accepted" (Tr. 70). Sergeant Quinn was totally unable to state whether or not he was "familiar with the contemporary community standard, even using... [his] definition, of the City of Miami" because he could not understand the question! (Tr. 70-71). When asked to point out any male or female genital organ on any of the statues, Sergeant Quinn could not do so and finally admitted that not one was visible (Tr. 64-79). In conclusion, Sergeant Quinn testified that he "did **not** weigh any possible artistic merits" of the statues; he then responded, with clear inconsistency, that in his opinion "there was some artistic merit but it did not outweigh the obscenity" (Tr. 77-78).

Officer Matta never had "any occasion to make an arrest based on obscenity" during his nine (9) years with the police department prior to the arrest in question. In his opinion the statues are pornographic as they "represent ... a sex relation of sorts" (Tr. 79-80). Officer Matta was not aware of the language of the statute involved (Tr. 81). Officer Matta is Catholic (Tr. 84). The first "test" of obscenity he applied was that "I wouldn't put one of these in church." Other tests were the opinion of "(f)our people that had a few words to say" and the fact that he talked to four children in the area (age 12 to 18) who were giggling and laughing and whom he told "to move on" (Tr. 82-83). He was as unfamiliar as Sergeant Quinn was with various books on sale in Dade County or read throughout the United States (Tr. 83-84), as well as with Michelangelo's "David" (Tr. 84-85). He admitted that defendant's statues do not show either male or female genital organs (Tr. 86). He had no art training whatsoever (Tr. 89). When asked "whether any of these statues have any artistic value," Officer Matta replied, "I am not qualified to answer ... I don't know." He made no determination of whether or not "they have artistic value" before deciding that they were obscene (Tr. 92). The concluding portion of Officer Matta's testimony follows:

> "Q (Mr. Thomas, City's attorney) — All of these things (the 6 statues) are just fiberglas. They just represent certain things to you?
> "A Yes.
>
> "THE COURT So your arrest solely is based on the thought process of what these statutes supposedly represent in relationship to sexual act?
> "A Yes.

"THE COURT Next Witness.

"Mr. Thomas That is the City's case."

(Tr. 94-95)

2. Petitioner's Case

Petitioner presented the testimony of three highly qualified expert witnesses as well as his own testimony.

Eugene Massin, Associate Professor of Art at the University of Miami, not only studied art at various universities but is also a practicing painter. He was first assistant to David Siqueiros, "one of the triumverate of Mexican muralists"; he won numerous prizes or awards and he has exhibited in various museums throughout the world including the Metropolitan Museum of Art and the Modern Museum in New York (Tr. 102-104). Professor Massin testified that so-called "erotic art or relationship to love as a theme in art has been practiced by the artists ... since the beginning of time" including scenes of sexual intercourse, and other sexual practices (Tr. 105-106). Today's artists deal with sexual themes no more than previously (Tr. 106). The artist "cannot exist in a society where at times he is given restrictions as to choice of subject matter, manner of production and presentation" (Tr. 107). In Professor Massin's "opinion as an artist, no art can be pornographic, not if it is art" (Tr. 109) and the statues in question "are a series of designs which are part of an art form" (Tr. 111). He values the statues "esthetically as a series of designs functioning in space"; he sees "no recognizable forms" and the statues, to him, "are structures based on a concept of the artist which is individual and which is his right to express" (Tr. 112).

Other people might view the statues as dealing with sexual matter as the "eye of the beholder" varies (Tr. 111). Professor Massin stated that "without having a preconceived idea" the two figures in one of the statues could "look like a cross, a spider or whathaveyou" and that the City's Attorney's conclusion depended upon his "preconceived" idea (the City's Attorney then stated that to him the statues symbolized "various perverted types of sexual perversions") (Tr. 117-118). Professor Massin had driven by the statues on the highway many times with his wife and children and did not find the statues offensive (Tr. 118-119). In response to questions by the trial court, Professor Massin testified that (1) it is not possible for statues to be "art . . . in a private place and institution . . . and at the same time . . . be classified as obscene in a public place as to the community as a whole," (2) children do not deem sculpture "obscene" unless it is presented as such to them by an adult, and (3) the public display of the statues in question would not affect the morals of the community (Tr. 120-121). Professor Massin defines pornography as "a particular visual experience in the eye of the beholder" (Tr. 108). He deemed himself incapable of determining whether or not something is "pornographic" but qualified to determine whether or not something is art (Tr. 108-109). In his expert opinion, the statues are definitely art (Tr. 111, 117, 119) and are not "prurient" (Tr. 116).

Jack Painter, Assistant Professor of Philosophy at the University of Miami, who specializes in esthetics and semantics (Tr. 125), testified that he saw Rodin's statue in a Paris museum (Def. Exh. #1), that it is an accepted work of art and that he has seen statues of similar figures

throughout the United States (Tr. 128-129). In his opinion, Petitioner "has used the sexual theme in an artistic manner" in the statues in question and the statues are "works of art" (Tr. 131). Professor Painter noted three definitions of art, (1) "the object must show evidence of individual creative expression," (2) "a work of art is a significant form," and (3) "a work of art is that object which produces a harmonious response." He demonstrated that defendant's statues are art under all three definitions (Tr. 132-133). He rejected classifying the statues as prurient or pornographic because they do not contain "abnormal appeal to the sexual" and they do have "energy, grace and balance" (Tr. 133, 142, 143). While approving of the Miami Ordinance itself (Tr. 137-138) Professor Painter did not deem the statues to come under it. Similarly, while agreeing with the City's Attorney that "there is a difference between an open highway and a museum," Professor Painter criticized the museums for taking art away from the public. In his opinion, art should not be "stored away in the museums" but should be "a part of our public life and in our homes and even in our public places" (Tr. 140-149). The determination of obscenity cannot depend on whether the sculpture is on private or public display (Tr. 147). Although "a certain segment" might consider the statues obscene, that "does not make it obscene" (Tr. 146) and Professor Painter feels the statues in question "should be on display" (Tr. 148).

J. A. Kapchan, Doctor of Philosophy and Psychology, Associate Professor of Social Science and Psychology at the University of Miami, and practicing clinical psychologist (Tr. 149-150) testified that he is familiar with the United States Supreme Court **Roth** test, is familiar with contemporary community standards in the field of sex,

and is familiar with various books dealing with sex (including "Tropic of Cancer" and "Pleasure Was My Business") now being sold and read in Dade County (Tr. 150-151). In his expert opinion, applying the **Roth** test, the statues in question "are not obscene" (Tr. 156-157). Things that are "highly symbolic and abstract" and "works of considerable complexity and depth" are not "'hardcore pornography or dirt for dirt's sake" and "don't have much of an aphrodisiac effect on people." Dr. Kapchan "had driven by Mr. Fort's place many times... [and had] not even seen" the statues (Tr. 157). In Dr. Kapchan's opinion, it makes no difference in determining obscenity whether an object is "on the public highway or in your closet," although "suppression... tend(s) to create more of a prurient interest in the public than... display..." (Tr. 158). Public display of the statues in question would have a "salubrious" rather than a "deleterious effect on the morality of this community" (Tr. 159). Dr. Kapchan did not deem himself qualified to evaluate the statues "artistically" because he is not an artist. He testified, however, that the statues have social importance with respect to the response of individuals who look at them and have potential social importance as possible diagnostic aids in clinical psychology (Tr. 160-161). The effect of the statues would depend on the individual viewer (Tr. 168). The City's Attorney stated that he could see nothing in Exhibit No. 6 but a specific form of sexual perversion and then asked Dr. Kapchan "What else could it be...?" Dr. Kapchan responded: "It could be people ballet dancing. It could be two fully clothed people with a man embracing his wife or a lot of things." (Tr. 169) Dr. Kapchan compared the fact that different people see "a wide variety of things" in the Rorschach tests (Tr. 170).

Marcel Fort, the Petitioner herein and defendant at trial, testified that he has been a professional artist since 1937 (Tr. 174-175). He studied art in the Beaux Arts, Paris, France, and has exhibited his paintings in the Caribbean and America, in Miami and in New York. His work has been advertised in reputable art journals including the "Art International," the "Jardin des Arts," and "Gallery des Arts" and "Le Jardin de Joie" (Tr. 175) With reference to themes he has painted, Petitioner testified that "at the beginning I was very representative, very objective, and as a creative artist I was not satisfied and always when I master one style, I abandon it and start to thinking about another style and I always am evoluting that way from one style to another." (Tr. 176). Petitioner had done landscape work, portrait work, still lifes, and pure abstract work (Tr. 176). He was commissioned to do the fourteen stations of the Cross... [by the] Catholic Church in Nassau... the Church of St. Paul and St. Peter and the paintings are still there now... displayed in the Church" (Tr. 178).

Petitioner was born in Paris, France. He lived in Paris until the war, was wounded as an officer for a mine sweeper in the middle east, and was a civilian for the remainder of the war (Tr. 178, 183). He has been an American citizen for about four years, and has lived in America about 10 years, having been a resident of the Fontainebleau for the first year (Tr. 178, 176). The "emotion of love or emotion of sex" has always interested Petitioner, and he started working in this area about four years ago. He did reading in the field, including the book "Kama Kala" which can be bought in Dade County at Burdine's (Tr. 176-177). He was also influenced by Rodin, Piscasso, other artists in New York and France, and erotic

sculpture, including Italian church art (Tr. 177-178). In Davie, Florida, four or five months before his arrest, Petitioner "was commissioned to make a 12 foot Buddha for a movie studio which . . . [he] made out of fiberglas." This was his first work in sculpture and it inspired Petitioner to make the fiberglas statues involved in the case at bar. Petitioner created City's Exhs. #2-7 over a period of two months and finished the statues a few weeks before the trial (Tr. 178-179). Petitioner continued the themes he had previously been working on in painting in the sculpture form. He moved from one medium to the other "to try to express myself in a way it would not offensive" (Tr. 179). He made the statues in question in order "to be creative." He created the statues "for artistic motives" and not to take advantage of a sexual market. "I don't sell sex, I sell art." (Tr. 180) Petitioner exhibited not only the statues but also various paintings of his for sale in his back yard (Tr. 181). Petitioner intended to symbolize "the emotion of love" when he sculpted the statues; in his opinion, the statues "will promote love" and deal with "normal love" (Tr. 183).

3. The City's Rebuttal

The City presented no evidence in rebuttal.

Federal Questions Raised

Petitioner unsuccessfully asserted his rights under the Fourteenth Amendment to the Constitution of the United States at all appropriate stages of the proceedings below.

One week after his arrest, Petitioner filed a Motion

to Suppress Evidence and to Quash the Complaint (Tr. 3-5). Shortly thereafter Petitioner filed a Supplemental Motion to Quash the Complaint (Tr. 1-2):

Question 1. presented herein, (i.e., the unconstitutional application of the Miami Ordinance to the statues as they are not obscene), was raised in ground 1 of the Supplemental Motion (Tr. 1); see, also ground 8 of the original Motion (Tr. 3).

Question 2. presented herein, (i.e., the unconstitutionality of the Ordinance on its face in view of its limited test for determining obscenity) was raised in ground 2 of the Supplemental Motion (Tr. 1), as well as grounds 6 and 3 of the original Motion (Tr. 3, 4).

Question 3. presented herein, (i.e., the unconstitutionality of the Ordinance on its face and/or as applied with reference to the statues' summary seizure and confiscation without warrant, adversary proceeding, or judicial determination of obscenity) was raised by grounds 1 through 8 of the original Motion (Tr. 3-5).

The Municipal Court initially reserved ruling on these Motions (Tr. 40, see, also 28-39). Following Petitioner's reiteration of the grounds therein at the close of the City's case (Tr. 96 et. seq.), the trial court denied both the Motion to Suppress the Evidence and Quash the Complaint and the Supplemental Motion to Quash the Complaint (Tr. 101).

At the close of the City's case, Petitioner moved to dismiss all of the charges on the grounds stated in its prior Motions to suppress and quash, as well as the further

ground that the City failed to establish a prima facie case (Tr. 96-100). The motion was denied by the trial court (Tr. 101), as was Petitioner's contention that he should be acquitted at the end of all the evidence presented at trial (Tr. 184-192, 194).

The trial court's finding follows:

"THE COURT: Mr. Fort, will you come forward, please.

"I think that a certain segment of our society probably would believe that your work is not obscene no matter where it may be and I think that also you would have the right at all times to create as you see fit, especially in private. I do not think that you intended purposely to commit a crime but we do have a City ordinance here and it is my job to see whether or not you have violated the City ordinance itself. Whether or not the ordinance is constitutional or not, I do not know, but my sole job is to determine whether or not this ordinance has been violated and the ordinance has been violated in the sense that I think that your work has been on public display and the City has proven that it is obscene, it is lewd, as far as public display is concerned, as stated solely under the ordinance so I am not the expert to determine whether or not it is obscene but under this ordinance you are guilty and the Court will find you guilty and assess a fine of one hundred dollars." (Tr. 194-195)

Petitioner's Motion for New Trial again raised the constitutional issues and was also denied (Tr. 196).

Petitioner contended on appeal to the Circuit Court that the Miami Ordinance was (see Question 1 herein) unconstitutional as applied to convict defendant for displaying the sculpture in question, Assignments of Error #15, Tr. 21-22, (see Question 2 herein) unconstitutional on its face with reference to its definition or test of obscenity, Assignments of Error #11, 12 and 16, Tr. 21-22, and (see Question 3 herein) unconstitutional on its face as applied with reference to the seizure and confiscation of the sculpture, Assignments of Error #10, 13, and 14, Tr. 21.

The Circuit Court affirmed "the findings and sentence of the Municipal Court of Miami" on August 5, 1966, with no exposition of or comment upon the issues in the case (Tr. 202, App. B).

Petitioner's petition for writ of common-law certiorari filed in the Florida District Court of Appeal (Tr. 205-214) asserted that the Circuit Court's affirmance of his conviction deviated from and was contrary to essential requirements of law in three ways: Paragraph 6a of the Petition raised **Question 1** presented herein (Tr. 209-210); Paragraph 6b corresponded to **Question 2** (Tr. 210); and Paragraph 6c raised **Question 3** (Tr. 211). In each instance petitioner asserted his deprivation of constitutional rights and explicitly set forth the decisions of this Court upon which he relied.

The Florida District Court of Appeal denied certi-

orari without opinion on January 18, 1967, the day following oral argument (Tr. 215, App. A).

REASONS FOR GRANTING OF WRIT

1. (Question 1) The decisions below, applying the Miami Ordinance to Petitioner on the ground that the statues are obscene and thus not protected by the Fourteenth Amendment to the Constitution of the United States, conflict with the required tests for determining obscenity as set forth in **Roth v. United States,** 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1948, **Jacobellis v. Ohio,** 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed 2d 793, and **A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Massachusetts** (hereinafter called the **Fanny Hill** case), 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed 2d 1.[4]

The required tests for obscenity are set forth as follows in the **Fanny Hill** case, **supra,** 383 U.S. at 418, 419, 420, 86 S.Ct. at 977, 978, 16 L.Ed. 2d at 5, 6 (opinion of Mr. Justice Brennan in which Mr. Chief Justice Warren and Mr. Justice Fortas joined:[5]

> "We defined obscenity in **Roth** in the following terms: '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole

[4]The "pandering" test involved in the *Fanny Hill* case, *supra*, as in *Mishkin v. New York*, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed. 2d 56, and *Ginzburg v. United States*, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed. 2d 31, has no relevance herein as neither evidence nor intimation of erotic advertisement or distribution is present in the case at bar.

[5]See section 2 of "Reasons . . .", *infra*, noting less restrictive views of Mr. Justices Stewart, Black and Douglas.

> appeals to prurient interest.' 354 U.S. at 489, 77 S.Ct. at 1311. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value...
>
> "Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness... [even if the material has] only a modicum of social value..."

See also **Jacobellis v. Ohio,** 378 U.S. 184, 191, 192, 84 S. Ct. 1676, 1680, 12 L.Ed. 2d 793, 799, 800 (opinion of Mr. Justice Brennan in which Mr. Justice Goldberg joined), adding that under the third test " 'the portrayal of sex... in art'... [or] in a manner that advocates ideas or that has artistic value or any other form of social importance may not be branded as obscenity and denied the constitutional protection..." It is clear that under the first test (concerning appeal to prurient interest) the average man refers to the average adult and not to children. **Roth v. United States, supra,** 354 U.S. at 490, 77 S.Ct. at 1312, 1 L.Ed.2d at 1510, **Bantam Books v. Sullivan,** 372 U.S. 58, 71, 83 S.Ct. 631, 640, 9 L.Ed. 2d 584, 594, **Butler v. Michigan,** 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed. 2d 412.

Clearly the statues in question and the pictures of the statues[6] are the best evidence before this Court on the issue of obscenity and constitutional protection. Describing counsels' positive reaction to the statues would be presumptuous, but noting the testimony[7] at trial is of value since the trial court relied exclusively thereon.

The testimony presented by the City's only two witnesses, Sergeant Quinn and Officer Matta, clearly established the fact that **both based their opinions of "obscenity" on totally constitutionally invalid bases,** i.e., the alleged effect of the statues on **children,** and their alleged appropriateness in **church.** Both were totally unfamiliar with the "appeal to prurient interest" test specifically and literally incorporated in the Miami Ordinance, both were totally unfamiliar with art and sculpture as well as with contemporary community standards, and both officers deemed the City of Miami, rather than the national United States, as the "community" in question.[8] In Sergeant Quinn's opinion, the statues **had** "some artistic merit but it did not outweigh the obscenity." In Officer Matta's own opinion, he was completely unqualified to determine whether or not the statues had any artistic value and he therefore did not even consider any possible artistic value of the statues before deciding that they were obscene.

Testimony on Petitioner's behalf evoked the constitutional protection discussed previously. Three highly quali-

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[6]Counsel's heightened response to the statues as compared to the pictures, especially in view of the statues' texture and appeal to the tactile sense, prompted forwarding of several of the statues to this Court in spite of the expense involved.

[7]All relevant evidence is noted with citations to the Certified Transcript in "Statement of the Case, Summary of the Evidence," *supra.*

[8]See *Jacobellis v. Ohio, supra,* 378 U.S. at 192-195, 84 S.Ct. at 1680-1682, 12 L.Ed. 2d at 801-802.

fied experts testified to the statues' lack of obscenity under each of the three constitutional tests, namely, absence of appeal to prurient interest, existence within the limits of customary candor, and presence of redeeming social importance. Professor Massin and Professor Painter explained in detail their expert opinions that the statues in question are works of art and are not obscene. Doctor Kapchan explained in detail his expert opinion that the statues have potential social importance as diagnostic aids in clinical psychology and are not obscene. All three stated that in their expert opinions the obscenity of material could not depend on its location in a public rather than a private place. Petitioner's own testimony established his long-time-status as a professional artist, a sincere and capable professional painter whose work has been exhibited in reputable museums in the United States and elsewhere and whose religious paintings are presently displayed in a Nassau Catholic Church. Petitioner attempted to express "the emotion of love" in the six statues and one measure of his artistic ability is the fact that the experts found energy, grace, balance and other attributes of art in his mere second attempt at sculpture. Obviously Petitioner's desire to express "the emotion of love" rather than to restrict himself to Buddhas-for-movies is commendable.

The trial court's finding of guilty was based on completely erroneous legal conclusions concerning its function in the case at bar and the significance of the evidence presented. The trial court based its finding on the following conclusion: "The City has proven that it is obscene, it is lewd, as far as public display is concerned... so I am not the expert to determine whether or not it is obscene ..." (Tr. 194-195). In the first place no decision of this

Court of which counsel is aware so much as intimates that material can be constitutionally protected for **private display** and yet **in and of itself** "obscene ... as far as **public display** is concerned." Indeed, this Court has clearly held that freedom of expression encompasses not only creation or utterance of the material, but also its free or commercial circulation or dissemination so long as no "pandering" is proven. See the **Fanny Hill** case, **supra, Ginzburg v. United States, supra,** 383 U.S. at 474, 86 S.Ct. at 949, 16 L.Ed. 2d at 40, **Smith v. California,** 361 U.S. 147, 150, 80 S.Ct. 215, 217, 4 L.Ed. 2d 205, 209, **Bantam Books vs. Sullivan, supra,** 372 U.S. at 66, 83 S.Ct. at 636, 9 L.Ed. 2d at 590 Secondly, the trial court explicitly refused to adjudicate the "issue of constitutional law" involved in a determination of obscenity and "treated [the issue] as a purely factual judgment..." **Jacobellis v. Ohio, supra,** 378 U.S. at 187, 188, 84 S.Ct. at 1678, 12 L.Ed. 2d at 797, 798, relying on **Roth v. United States, supra,** 354 U.S. at 497-498 (separate opinion); see also the **Fanny Hill** case, **supra,** 383 U.S. at 418-421, 86 S.Ct. at 977-979, 16 L.Ed. 2d at 5-7. Thirdly, as shown previously, the police officers' testimony on the City's behalf was constitutionally irrelevant to the issue of obscenity.

The basis for the Circuit Court's affirmance of the trial court's conviction of petitioner is unknown, as are the reasons for the District Court of Appeal's denial of certiorari, because said courts did not see fit to write opinions herein.

Within the past few years, this Court has summarily reversed Dade County's banning of two books as obscene,

"Pleasure Was My Business" and "Tropic of Cancer,"[9] in view of the Fourteenth Amendment's protection of freedom of expression. **Tralins v. Gerstein,** 378 U.S. 576, 84 S.Ct. 1903, 12 L.Ed. 2d 1033, and **Grove Press v. Gerstein,** 378 U.S. 577, 84 S.Ct. 1909, 12 L.Ed. 2d 1035, per curiam decisions in which the five Justices in favor of granting certiorari and reversal relied on their **Jacobellis v. Ohio** opinions. Petitioner submits that the six statues involved herein have been similarly unconstitutionally banned.

Although to counsels' knowledge no decision of this Court has involved **sculpture** banned as obscene, it would seem clear that such form of art is entitled to the same protection as literature and motion pictures. As stated in **Poe v. Ullman,** 376 U.S. 497, 514, 81 S.Ct. 1752, 1761, 6 L.Ed. 2d 989, 1002 (dissenting opinion of Mr. Justice Douglas), "the artist whose creation is in oil or clay or marble... [is among those who] are beneficiaries of freedom of expression." Petitioner, whose artistic creations are sculpted in fiberglas, submits that the vitally important constitutional protection extends to (1) his and other sculptors' right to create and communicate thusly and (2) the public's right to receive and enjoy such three-dimensional expression.

2. (Question 2) The decisions below, upholding the constitutionality of the Miami Ordinance on its face in spite of its sole and exclusive "appeal to prurient inter-

[9]In the case at bar Sergeant Quinn testified that he never finished reading "Tropic of Cancer" as he deemed it "obscene" and he was completely unfamiliar with "Pleasure Was My Business." Officer Matta never read "Tropic of Cancer" at all.

est" test for determining obscenity, conflict with this Court's opinions in **Roth v. United States, supra, Jacobellis v. Ohio, supra,** and the **Fanny Hill** case, **supra,** setting forth three tests which must all be met before suppression occurs. The Ordinance equates obscenity with appeal to prurient interest, giving no recognition to the "patent offensiveness" (or "beyond customary limits of candor") and social importance tests. The Ordinance thus permits banning and destruction of material which meets the prurient interest requirement even though such material does not go substantially beyond customary limits of candor or has some redeeming social importance.

Petitioner is of course aware that the "fourteen separate opinions handed down in these three cases,"[10] **Fanny Hill, Mishkin** and **Ginzburg, supra,** a little over a year ago reveal sharp disagreements among the Justices of this Court concerning the proper constitutional tests for obscenity. As a majority of this Court affords constitutional protection to material not meeting the three tests set forth above (such majority including one Justice who would extend protection to all material but hard-core pornography[11] and two Justices who would extend protection to all material expressing ideas[12]), Petitioner has urged the unconstitutionality of the Miami Ordinance in failing to include the three tests.

Petitioner also respectfully urges that this Court reconsider adopting a "clear and present danger" test for all so-called obscene materials, a test extending constitutional

[10] *Ginzburg v. U. S., supra,* 383 U.S. at 480-481, 86 S.Ct. at 952, 16 L.Ed. 2d at 44 (dissenting opinion of Mr. Justice Black).

[11] See e.g. *Ginzburg v. U. S., supra,* 383 U. S. at 499, 86 S.Ct. at 957, 16 L.Ed. 2d at 54 (dissenting opinion of Mr. Justice Stewart).

protection to all expression not "brigaded with illegal action."[12]

3. (Question 3) The decisions below, upholding the seizure and confiscation of the statues in question by the arresting officers on the basis of their own opinions of obscenity and with no warrant or judicial adversary proceeding to determine the issue of obscenity, conflict with this Court's decisions in **Marcus v. Search Warrants of Property**, 367 U.S. 717, 81 S.Ct 1708, 6 L.Ed. 2d 1127, **A Quantity of Copies of Books v. Kansas**, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed. 2d 809, **Freedman v. Maryland**, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649, and **Bantam Books v. Sullivan**, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed. 2d 584.[13]

The Miami Ordinance involved, Ch. 43, sec. 38 incor-

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[12]See the *Fanny Hill* case, *supra*, 383 U.S. at 424, 86 S.Ct. at 980, 16 L.Ed. 2d at 9 (concurring opinion of Mr. Justice Douglas); *Roth v. United States*, *supra*, 354 U.S. at 507, 77 S.Ct. at 1321, 1 L.Ed. 2d at 1520 (dissenting opinion of Mr. Justice Douglas with whom Mr. Justice Black concurred); *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 690, 79 S.Ct. 1362, 1370, 3 L.Ed. 2d 1512, 1517 (concurring opinion of Mr. Justice Douglas in which Mr. Justice Black joined); *Jacobellis v. Ohio*, *supra*, 378 U.S. at 196, 84 S.Ct. at 1682, 12 L.Ed. 2d at 803 (separate opinion of Mr. Justice Black with whom Mr. Justice Douglas concurred; *Mishkin v. New York*, *supra*, 383 U.S. at 515, 86 S.Ct. at 968, 16 L.Ed. 2d at 968 (dissenting opinion of Mr. Justice Black); *Ginzburg v. U.S. supra*, 383 U.S. at 476, 482, 86 S.Ct. at 950, 969, 16 L.Ed. 2d at 41, 45 (dissenting opinions of Mr. Justices Black and Douglas, respectively).

[13]The record was held insufficient to raise this issue in *Mishkin v. New York*, *supra*, 383 U.S. at 513, 86 S.Ct. at 966, 16 L.Ed. 2d at 64, unlike the record in the case at bar (see "Statement of the Case, Federal Questions Raised," *supra*.

porates or adopts Florida Statute Sec. 847.011(6) (Appendix C **infra**) which permits seizure and confiscation of any material deemed obscene under the statute (and **a fortiori** under the Miami Ordinance) "by any authorized law officer . . ." as well as Florida Statute Sec. 847.03 (Appendix C **infra**) which requires an arresting officer under Sec. 847.011 to seize the alleged obscene material and take it into custody.[14]

The Miami Ordinance permitted, and the arresting officers in the case at bar accomplished thereunder, seizure and confiscation of the statues without a warrant, without any judicial determination of obscenity, without any notice to Petitioner to present evidence on his behalf, and without any basis for the seizure and confiscation other than the arresting officers' personal opinions; i.e., the personal opinions of unqualified policemen relying on personal feelings concerning what's good for children and church.

In **Marcus v. Search Warrants of Property, supra,** this Court held unconstitutional police officers' seizure of material as obscene, without notice to the owners or adversary hearing, pursuant to warrants issued purely on the basis of the officers' opinion of obscenity:

> "It is no reflection on the good faith or judgment of the officers to conclude that the task they were assigned was simply an impossible one to perform with any realistic expectation that the obscene might be accurately separated from the

[14]See also secs. 847.011(7) and 847.02 Appendix C *infra*, which are not involved in the case at bar but which also permit unconstitutional seizure and confiscation.

> constitutionally protected. They were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." (367 U.S. at 731, 732, 81 S.Ct. at 1716, 6 L.Ed. 2d at 1136)
>
> "A distributor may have every reason to believe that a publication is constitutionally protected and will be so held after judicial hearing, but his belief is unavailable as against the contrary judgment of the police officer who seizes it from him." (367 U.S. at 737, 81 S.Ct. at 1719, 6 L.Ed. 2d at 1139)

Similarly, in **A Quantity of Books v. Kansas, supra,** this Court held that "in not first affording P-K (the distributor) an adversary hearing, the procedure leading to the seizure order was constitutionally deficient . . ." (opinion of Mr. Justice Brennan in which Mr. Chief Justice Warren and Mr. Justices White and Goldberg joined, 378 U.S. at 210, 84 S.Ct. at 1726, 12 L.Ed. 2d at 813). As stated in **Freedman v. Maryland, supra,** holding a Maryland movie censorship statute unconstitutional, "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression . . ." (380 U.S. at 58, 85 S.Ct. at 738, 739, 13 L.Ed. 2d at 654).

In the **A Quantity of Copies of Books** case, **supra,** 378 U.S. at 212, 213, 84 S.Ct. at 1727, 12 L.Ed. 2d at 814, this Court reversed the judgment based on a finding of obscenity "since a violation of the Fourteenth Amendment infected the proceedings, in order to vindicate appellants' constitutional rights . . ." (quoting from and relying

on **Marcus v. Search Warrants of Property, supra,** 367 U.S. at 788, 81 S.Ct. at 1719, 6 L.Ed. 2d at 1140).

Petitioner submits that the unconstitutionality of the Miami Ordinance on its face and as applied in the case at bar with reference to the seizure and confiscation of the statues involved requires reversal of Petitioner's conviction and sentence as well as return of the statues to Petitioner whether the statues are or are not "obscene."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted, the decisions below reversed and the statues returned to Petitioner.

Respectfully submitted,

By _____
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CERTIFICATE OF SERVICE

I, IRMA ROBBINS FEDER, Counsel for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on April 12, 1967, I served copies of the foregoing Petition for Writ of Certiorari on the Respondent by mailing a copy thereof in a duly addressed envelope to JACK R. RICE, JR., City Attorney, and JOHN G. THOMAS, Assistant City Attorney, 65 S. W. First Street, Miami, Florida 33130.

.....

IRMA ROBBINS FEDER
312 Biscayne Building
Miami, Florida 33130
Attorney for Petitioner

APPENDIX A

OPINION OF FLORIDA DISTRICT COURT OF APPEAL

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

January Term, A.D. 1967

Wednesday, January 18, 1967

Case No. 66-840

MARCEL FORT,

Petitioner,

vs.

THE CITY OF MIAMI,

Respondent.

This cause having heretofore been submitted to the court on petition for writ of certiorari upon the transcript of record and briefs to review the order of the Circuit Court for Dade County (Criminal Appeal No. 5835) in said cause bearing date August 5, 1966 and the record having been considered, it is ordered that said petition be and the same is hereby denied.

APPENDIX B

ORDER OF CIRCUIT COURT

ORDER OF AFFIRMANCE

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA. AT LAW. CRIMINAL APPEAL
NO. 5835

MARCEL FORT,

Appellant,

vs.

THE CITY OF MIAMI,

Appellee.

THIS CAUSE having come on for Final Hearing and there having appeared counsel for both parties who argued and the Court having considered the Briefs and being otherwise sufficiently advised, it is, therefore

ORDERED AND ADJUDGED:

That the finding and sentence of the Municipal Court of Miami are hereby affirmed.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 5th day of August, 1966.

HAROLD R. VANN
Circuit Judge

APPENDIX C

FLORIDA STATUTE sec. 847.011—Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty

(1) (a) A person who knowingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employs, uses, or permits any person to do or assist in doing, either

knowingly or innocently, any act or thing mentioned above, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding $1,000.00, or both. A person who, after having been convicted of a violation of this section, thereafter violates any of its provisions, is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000.00, or by both such fine and imprisonment.

(b) The knowing possession by any person of six or more identical or similar materials, matters, articles, or things coming within the provisions of the foregoing paragraph (a) is presumptive evidence of the violation of said paragraph.

(2) A person who knowingly has in his possession, custody, or control any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding six months or by fine not

exceeding $500.00, or both. In any prosecution for such possession, it shall not be necessary to allege or prove the absence of such intent.

(3) No person shall as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication require that the purchaser or consignee receive for resale any other article, paper, magazine, book, periodical, or publication reasonably believed by the purchaser or consignee to be obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic, and no person shall deny or threaten to deny or revoke any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept any such article, paper, magazine, book, periodical, or publication, or by reason of the return thereof. Whoever violates this section is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000.00, or by both such fine and imprisonment.

(4) Every act, thing, or transaction forbidden by this section shall constitute a separate offense and shall be punishable as such.

(5) Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this section may be made by showing that at the time such act was committed or conduct engaged in he had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, or by showing facts and circumstances from which it may fairly be inferred that he had such knowledge, or by showing that he

had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character.

(6) There shall be no right of property in any of the materials, matters, articles, or things possessed or otherwise dealt with in violation of this section, and upon the seizure of any such material, matter, article, or thing by any authorized law enforcement officer the same shall be delivered to and held by the clerk of the court having jurisdiction to try such violation. When the same is no longer required as evidence, the prosecuting officer or any claimant may move the court in writing for the disposition of the same and after notice and hearing, the court, if it finds the same to have been possessed or otherwise dealt with in violation of this section, shall order the sheriff to destroy the same in the presence of the clerk; otherwise, the court shall order the same returned to the claimant if he shows that he is entitled to possession. If destruction is ordered, the sheriff and clerk shall file a certificate of compliance.

(7) (a) The circuit court has jurisdiction to enjoin a threatened violation of this section upon complaint filed by the state attorney, county solicitor, or county prosecuting attorney in the name of the state upon the relation of such state attorney, county solicitor, or county prosecuting attorney.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person complained of until final hearing or further order of the court. Whenever the relator state attorney, county solicitor or county prosecuting attorney shall request a judge of said court to set a hearing upon an

application for such a restraining order, such judge shall set such hearing for a time within three days after the making of such request. No such order shall be made unless such judge shall be satisfied that sufficient notice of the application therefor has been given to the party restrained of the time when and place where the application for such restraining order is to be made, provided, however, that such notice shall be dispensed with when it is manifest to such judge, from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person, that the apprehended violation will be committed if an immediate remedy is not afforded.

(c) The person sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

(d) In the event that a final decree of injunction is entered, it shall contain a provision directing the defendant having the possession, custody, or control of the materials, matters, articles, or things affected by the injunction to surrender the same to the sheriff and requiring the sheriff to seize and destroy the same. The sheriff shall file a certificate of his compliance.

(e) In any action brought as provided in this section, no bond or undertaking shall be required of the state or the state attorney or county solicitor or county prosecuting attorney before the issuance of a restraining order provided for by paragraph (b) of this subsection, and there shall be no liability on the part of the state or the state attorney or the county solicitor or the county prosecuting attorney for costs or for damages sustained by

reason of such restraining order in any case where a final decree is rendered in favor of the person sought to be enjoined.

(f) Every person who has possession, custody, or control of, or otherwise deals with any of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

(8) The several sheriffs, constables, state attorneys, county solicitors, and county prosecuting attorneys shall vigorously enforce this section within their respective jurisdictions.

(9) This section shall not apply to the exhibition of motion picture films permitted by § 521.02.

(10) For the purpose of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

(11) For the purposes of this section, the word person includes individuals, firms, associations, corporations, and all other groups and combinations. (Laws 1961, c.61-7, §§1-11)

FLORIDA STATUTE sec. 847.02—Confiscation of obscene books, etc.

Whenever anyone is convicted under sec. 847.011, the

court in awarding sentence shall make an order confiscating said book, pamphlet, ballad, printed paper, picture, slide, film, or other thing and authorize the executive officer of the court to destroy the same. (Comp. Gen. Laws 1927 sec. 7582)

FLORIDA STATUTE sec. 847.03—**Officer to seize books, etc.**

Whenever any officer arrests any person charged with any offense under sec. 847.011, he shall seize said book, pamphlet, ballad, printed paper, picture, slide or film, or other thing, and take the same into his custody to await the sentence of the court upon the trial of the offender. (Comp. Gen. Laws 1927, sec. 7583)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 91

MARCEL FORT,

Petitioner,

vs.

THE CITY OF MIAMI,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

JACK R. RICE, JR., City Attorney
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. _____

MARCEL FORT,

Petitioner,

vs.

THE CITY OF MIAMI,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

OPINIONS BELOW

Petitioner has correctly set forth the facts concerning the opinions below.

JURISDICTION

We disagree with petitioner's contention that neither appeal nor certiorari lies to the Supreme Court of Florida.

Further discussion by respondent will be undertaken

in its argument with respect to the question concerning the jurisdiction of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCE INVOLVED.

Petitioner has set forth in his brief and appendix Chapter 43, section 38 of The City of Miami Code and Section 847.011, Florida Statutes, the Florida obscenity statute, the violation of which is made a violation of the Miami City Code.

Respondent refers in its brief to the following constitutional provision and statutes and has set forth their pertinent texts in a supplemental appendix.

Title 28, Section 1257(3) U. S. Code, Title 10, Section 925, U. S. Code, Section 4(2), Article V, Florida Constitution, Sections 800.01 and 800.02, Florida Statutes, McKinney's Consolidated Laws of New York, Anno. Book 39, Part I, Section 690, Illinois Criminal Code of 1961, Chapter 38, Section 11-2, Title 9, Section 288A, Laws of California.

QUESTIONS PRESENTED

I WHETHER OR NOT THIS COURT HAS JURISDICTION TO ENTERTAIN THIS PETITION.

II WHETHER OR NOT THE ORDINANCE IN QUESTION WAS UNCONSTITUTIONALLY APPLIED TO PETITIONER.

III WHETHER OR NOT THE ORDINANCE IN QUESTION IS UNCONSTITUTIONAL.

STATEMENT OF THE CASE

Respondent generally agrees with the content of petitioner's Statement of the Case taking exception, however, to one or two argumentative conclusions.

SUMMARY OF ARGUMENT

JURISDICTION

This Court does not have jurisdiction to entertain the petition for writ of certiorari because petitioner has failed to exhaust his Florida appellate remedies.

A decision of a District Court of Appeal in Florida is reviewable on certiorari granted by the Florida Supreme Court in the event such decision conflicts on the same point of law with a prior decision of the Supreme Court or another District Court of Appeal. To this extent, complete exhaustion of Florida's appellate processes would comprehend ultimate consideration and disposition of a particular case by action of the Florida Supreme Court.

CONSTITUTIONAL APPLICATION OF ORDINANCE

The ordinance was not unconstitutionally applied to petitioner. The statues meet the test of obscenity enunciated by this Court in the Fanny Hill case. **A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Massachusetts** (Fanny Hill case), 383 U.S.413, 86 S. Ct. 975, 16 Law Ed. 2d 1.

State laws forbid the type of unnatural sex acts portrayed by the statues. Where such unnatural acts constitute crimes of moral turpitude in the United States, their public portrayal by means of statues must be an affront to contemporary community standards.

Testimony of petitioner's own witnesses to the effect that the statues could tend to influence the sex urge of not only adults but children prove they appeal to a prurient interest in sex. The crudely constructed statues, themselves, clearly indicate no redeeming social value.

The statues were not unconstitutionally seized and confiscated. The decisions below upholding the seizure are not in conflict with this court's decisions.

CONSTITUTIONALITY OF THE ORDINANCE

The ordinance involved is constitutional. The Florida obscenity statute, the violation of which is made a violation of respondent's ordinance, is actually more explicit than either the Federal obscenity statute or the California obscenity statute, both of which were upheld as constitutional by this Court in the Roth case. **Roth v. United States**, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498.

SUMMARY OF TESTIMONY

Petitioner has presented a biased and argumentative summary of evidence containing some misleading quotations out of context. Further, petitioner in his brief on page 12 seems to have inadvertently misquoted a Professor Massin and cites transcript page numbers which do not

include testimony by Professor Massin. Respondent, therefore, presents its own summary of the testimony.

Two police officers, Sergeant Quinn and Officer Matta, testified on behalf of respondent.

Sergeant Quinn testified as follows:

He arrested the petitioner, MARCEL FORT, on August 11, 1965, near the intersection of South Dixie Highway and Bridgeport Avenue in the City of Miami (Tr 17). Six statues were exhibited on the lawn of petitioner's property so that they were exposed to the very busy highway with two signs offering the objects for sale (Tr 18,20,21).

The objects on petitioner's lawn indicated or represented the following:

1. A sexual practice known as "six nine" in which a female figure was held upside down by a male with the mouth of the male by the sexual organ of the female and vice versa (Tr 22; Exhibit 2).

2. A female kneeling down with the mouth on the male sexual organ (Tr 24; Exhibit 3).

3. A male holding a female with her legs spread with the male between the legs of the female in an obvious situation of sexual relations (Tr 25; Exhibit 4).

4. A crudely made statue in two colors—black and white — exhibiting the private parts — pubic hairs — of a female (Tr 26; Exhibit 5).

5. A male and female with the anterior portion of the male's middle pressed against the posterior portion of the female's middle. The female's hand was to the right of the male's neck and the male's left hand was between the legs of the female (Tr 27; Exhibit 6).

6. A female upside down with her legs spread and a man kneeling behind her with his head from the rear to the private parts of the female (Tr 27; Exhibit 7).

All of the objects or statues were life-size and could easily be seen from the highway (Tr 27-28). They were pornographic and Sergeant Quinn "ran off" some little girls for that reason (Tr 22). It was obvious to anyone who looked at them what the statues represented (Tr 35).

There were complaints about the statues (Tr 45).

Officer Matta testified as follows:

The statues represented human figures — male and female — in contact with one another in a sexual relation of sorts (Tr 56). From the attitude of people and the positions of the statues, they were obscene (Tr 60).

The figures appeared to be nude and the statues were made of fiberglas (Tr 67,70).

Besides himself, petitioner presented three witnesses.

Eugene Massin, Associate Professor of Art, at the University of Miami testified as follows:

He was familiar with erotic art (Tr 81). He did not

agree that there should be a law against pornography and did not know what pornography was (Tr 95). No art can be pornographic (Tr 85). The statues were a series of designs which were a part of an art form (Tr 87).

Jack Painter, Professor of Philosophy at the University of Miami testified as follows:

He could not specify whether the figures were in a certain act of intercourse but obviously saw human bodies in contact with one another and there was a sexual theme (Tr 107).

From certain structural problems he would not say that these works were entirely successful but would say they were competent works of art (Tr 108).

He had seen billboards that were highly suggestive and the front ends of cars that looked like vaginas. He had seen a car with a vagina in front (Tr 115).

He was not an authority on the average cross-section of Miami (Tr 119).

Dr. J. A. Kapchan, Associate Professor of Social Science and Psychology and a practicing clinical psychologist, testified as follows:

Clinical psychology deals with diagnosis of abnormal behavior, marital problems and problems of personality maladjustment (Tr 126).

Certain large cars like Cadillacs might unconsciously mean penis to people, and hardtop convertibles might have

homosexual reference (Tr 132). The six statues (Exhibits 2 through 7) were not obscene. With reference to the statues, when Dr. Kapchan first saw them he did not see sexual themes at all. Only when he was asked to look more closely and some of the things were pointed out to him by Mr. Fort (petitioner) could he see the various sex themes. In referring to Exhibit 7, he felt "that thing there was a penis that had lost its erection." (Tr 133)

Dr. Kapchan would like to sit down and see if he could not use some of petitioner's techniques as a diagnostic aid. On this basis it had social importance, potentially (Tr 137). He would rather see a "voyeur" looking at the statues than peeping in somebody's window at night (Tr 137).

The statues could tend to influence the sex urge of not only adults but children (Tr 141). The statues would have an effect on a teenager or even a younger person viewing them (Tr 141).

On the subject of signs with a good looking bathing beauty and a coca cola bottle on the same sign, "the mass motivation people might tell you the coca cola bottle is a penis." (Tr 144).

An erotic desire means a sexual desire and all people have sexual desires (Tr 144).

Petitioner, MARCEL FORT, testified as follows:

He was influenced by the book KAMA KALA, by Rodin, Picasso, many artists in New York and France, and very erotic sculpture in Italy (Tr 154).

He was the creator of Exhibits 2 through 7 (Tr 154-155). The exhibits were made in fiberglas (Tr 155). He had a sign advertising contemporary art (Tr 157).

When he made the structures he intended to symbolize the emotion of love. It was his contention that they would promote love and felt that was normal love (Tr 159).

ARGUMENT

QUESTION I

This court does not have jurisdiction to entertain this petition.

Petitioner seeks review by this Court by virtue of the provisions of Title 28, Section 1257(3), United States Code.

The judgment, however, which he seeks to have reviewed was not rendered by the highest court of this State in which a decision could be had. See Section 4(2), Article V, Florida Constitution; **Dresner v. City of Tallahassee**, Fla. 1964, 164 So.2d 208.

In **Dresner v. City of Tallahassee**, supra, this Court certified certain questions to the Supreme Court of Florida with respect to the jurisdiction of Florida appellate courts.

The Florida Supreme Court observed that a decision of a District Court of Appeal is reviewable on certiorari granted by the Florida Supreme Court in the event that such decision conflicts on the same point of law with a prior decision of the Supreme Court or another District

Court of Appeal or if the decision initially construes a controlling provision of the state or federal constitution or initially passes upon the validity of a state or federal statute or treaty. The Florida Supreme Court then stated as follows:

> "To this extent complete exhaustion of Florida's appellate processes would comprehend ultimate consideration and disposition of a particular case by action of the Florida Supreme Court timely and properly invoked."

Petitioner, however, did not apply to the Supreme Court of Florida for a writ of certiorari.

As the Florida Supreme Court pointed out in Dresner, the affirming judgment of a circuit court did not construe but merely applied federal constitutional questions. Thus, there would be no possibility for review by certiorari on the basis that the instant District Court of Appeal decision construed a controlling provision of the state or federal constitution.

The question as to whether there is or is not a conflict between the instant decision and a decision of another District Court of Appeal or of the Florida Supreme Court is, however, left open.

We are familiar with the opinion of the Florida Supreme Court in **Callendar v. State**, Fla. 1966, 181 So.2d 529, in which the court remarked that the appellants who had sought review of a District Court of Appeal decision by the Florida Supreme Court had gone too far in the

Florida courts before seeking relief in the federal Supreme Court.

In Callendar, however, the Florida Supreme Court had, *ex mero motu*, dismissed an appeal by the appellants. Thus, the question of the finality of the District Court of Appeal decision had been determined.

In the instant case, the question of whether petitioner would be entitled to review by the Florida Supreme Court remains unanswered, and, therefore, there is a probability existing that the District Court of Appeal is **not** the highest court in which a decision could be had.

Absent a clear showing by petitioner that he is not entitled to a review by certiorari by the Florida Supreme Court, he cannot show that which he must show — that the District Court of Appeal is the highest court in which a decision could be had in the case at bar.

Petitioner could have sought review of the District Court of Appeal decision by filing a petition for writ of certiorari in the Florida Supreme Court. He did not, and thus failed to exhaust his Florida appellate remedies before applying to this court for relief.

QUESTION II

The ordinance in question was not unconstitutionally applied to petitioner.

1. Concerning petitioner's Question 1.

Petitioner contends the decisions below regarding

the obscenity of his statues conflict with the required tests for determining obscenity as set forth in **Roth v. United States**, supra, **Jacobellis v. Ohio**, 378 U.S. 184, 84 S. Ct. 1676, 12 Law. Ed. 2d 793, and **A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Com. of Massachusetts**, supra.

This contention is erroneous. None of the above three cases pertains to statues publicly displayed near a busy highway. The **Roth** and **Fanny Hill** cases deal with books. **Jacobellis** deals with a motion picture.

Books and motion pictures; of course, may be read or viewed at the option of the public. The statues in question were on public display for all to see. Even if we accept the argument, however, that the test in **Fanny Hill** must be applied the statues meet this test.

Does the dominant theme of the material as a whole appeal to a prurient interest in sex?

The statues themselves are the best evidence to prove this element. They portray various abnormal and unnatural sex practices such as "six nine," oral copulation and anal intercourse (buggery) (Tr 22). One of the statues is painted white with a patch of black paint between the legs of the female figure.

The prurient interest appeal was further proved by witnesses for petitioner. One of petitioner's witnesses admitted he obviously saw human bodies in contact with one another and there was a sexual theme. Another witness, the clinical psychologist, admitted that the statues could tend to influence the sex urge of not only adults but

children and that they would have an effect on a teenager or even a younger person viewing them (Tr 141). Petitioner, himself, testified that he intended by the structures to symbolize the emotion of love. It was his contention they would promote love. Petitioner felt that was normal love (Tr 159).

The most obvious admission of an appeal to a prurient interest in sex was made by the clinical psychologist, Dr. Kapchan, when he stated:

> "I would much rather see a voyeur looking at these statues than peeping in somebody's window at night." (Tr 137)

Is the material patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters?

Petitioner's own counsel on cross examination of Sergeant Quinn elicited the fact that there were complaints about the statues (Tr 45). Officer Matta testified that he felt the statues were obscene because of the attitude of people and the positions of the statues (Tr 60).

Accepting the principle that the contemporary community standard is a national standard, we submit that a perusal of the laws of all fifty states will reflect that each one has laws proscribing the type of sexual practices portrayed by the statues.

Three of the most populous states in the United States, New York, California and Illinois, have laws which

describe with particularity the unnatural and abnormal sex relations portrayed by the statues and forbid such acts.

For instance, a New York statute makes a person who carnally knows any male or female person by the anus or by or with the mouth guilty of sodomy and makes the crime punishable with imprisonment for not more than twenty years. McKinney's Consolidated Laws of New York, Anno. Book 39 Part I, Section 690.

An Illinois statute describes deviate sexual conduct as meaning any act of sexual gratification involving the sex organs of one person and the mouth or anus of another. Illinois Criminal Code of 1961, Chapter 38, Section 11-2.

A California statute provides that any person participating in an act of copulating the mouth of one person with the sexual organ of another may be punished by imprisonment in the state prison for a period not exceeding fifteen years. Title 9, Section 288A, Laws of California.

General military law provides that unnatural, carnal copulation with another person of the same or opposite sex is sodomy. Title 10, Section 925, United States Code.

Florida law prohibits crimes against nature and unnatural and lascivious acts with other persons. Section 800.01 and 800.02, Florida Statutes.

Thus, both the National Congress and various state legislatures, in representing the American public, have made it a crime to engage in the unnatural sex acts portrayed by the statues involved.

OBVIOUSLY, IF SUCH UNNATURAL ACTS CONSTITUTE CRIMES OF MORAL TURPITUDE THEIR PUBLIC PORTRAYAL BY MEANS OF STATUES MUST BE AN AFFRONT TO CONTEMPORARY COMMUNITY STANDARDS.

This court, in **Roth v. United States**, supra, notes the fact of obscenity laws throughout the world by stating as follows:

> ". . . but implicit in the history of the first amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in a universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1856."

Is the material utterly without redeeming social value?

Once again, we refer to the statues. They are crudely constructed in fiberglas. Petitioner's own witness admitted the statues were not entirely successful from certain structural problems (Tr 108).

The extremely crude application of the fiberglas by petitioner clearly indicates he was interested only in obscenity. How can such crudeness have any redeeming social value? The statues are merely obscene.

In his brief, petitioner attempts to contend there

was expert testimony to the effect that the statues had some social importance. Such, however, is not the case. Only one of petitioner's witnesses, the clinical psychologist, even discussed social importance. The psychologist, however, appeared to be discussing not the statues but petitioner's techniques of drawing as a diagnostic aid. Even then the psychologist only agreed that this had social importance "potentially." (Tr 137)

Indeed, it is clearly apparent from the testimony of the psychologist that he was greatly interested in petitioner himself as a subject of clinical interest for study.

This court, by its decision in **Roth v. United States**, supra, makes it crystal clear that the trial court as a finder of fact in this case was the exclusive judge regarding the common conscience of the community and capable of determining the obscenity or otherwise and the redeeming social value or otherwise of the statues without the assistance of so-called expert testimony.

Petitioner apparently contends that children must be excluded from consideration in the establishment of the elements involved to determine the appeal of the statues to prurient interest.

Such is not the case. This court in **Roth v. United States**, supra, clearly held, by approval of an instruction to the jury by the lower court, that the test was the effect of the book, picture or publication considered as a whole not upon any particular class but upon all those it was likely to reach. To be considered was the community as a whole, young and old, educated and uneducated, religious and irreligious, men, women and children.

Thus, the testimony of the police officers concerning their own feelings, and concerning the feelings exhibited by the fact of complaints of others, is a far better test to meet the doctrine enunciated in the **Roth** case than the testimony of three college professors, two of which did not even pretend to be authorities on any community standards. The third college professor, who made some pretense at being an authority, was a clinical psychologist dealing with abnormal persons. He admitted the statues would influence the sex urge of adults, teenagers and children. We submit that college professors ensconced in the ivory towers of such sparsely populated classrooms as those of art and philosophy are not qualified to judge the conscience of the community as a whole.

Concerning petitioner's contention that the trial court's finding of guilty was based on an erroneous legal conclusion, we need only to quote the following from this court's opinion in **Ginzburg v. United States**, 383 U. S. 463, 86 S.Ct. 942, 16 L. Ed. 2d 31:

> "We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise."

The public display of the statues was the culmination of the offense.

2. Concerning Petitioner's Question 3.

Petitioner contends the decisions below upholding

what he terms seizure and confiscation of his statues with no warrant or judicial adversary proceeding to determine the issue of obscenity conflict with this court's decision in **Marcus v. Search Warrants of Property**, 367 U. S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127, **A Quantity of Copies of Books v. Kansas**, 378 U.S. 205, 84 S. Ct.1723, 12 L. Ed. 2d 809, **Freedman v. Maryland**, 380 U.S.51, 85 S. Ct.734, 13 L. Ed. 2d 649, and **Bantam Books v. Sullivan**, 372 U.S. 58, 83 S. Ct.631, 9 L.Ed. 2d 584. This is an erroneous contention.

All of these cases cited by petitioner except **Freedman** deal with publications and firms distributing books and magazines. **Freedman** is concerned with exhibition of movie films. In **Marcus**, a Missouri law authorized a search for and seizure of allegedly obscene publications by a warrant issued on the basis of a sworn complaint filed with a judge or magistrate in an ex parte proceeding. Following the issuance of such a warrant, Missouri officers seized all magazines in the establishment of a news distributor, not confining themselves to the original list of publications on which the warrant issued. The distributor's stock of magazines ran into hundreds of thousands of copies.

In the case of **A Quantity of Copies of Books v. Kansas**, supra, under somewhat similar circumstances, 1,715 books were seized by the sheriff pursuant to a warrant issued on the basis of a Kansas statute authorizing seizure of allegedly obscene books before an adversary determination of their obscenity.

In **Bantam Books v. Sullivan**, supra, the Rhode Island Legislature created a commission to encourage morality in youth and gave the commission, *inter alia*, the duty to investigate and recommend prosecution of violations of

sections of the Act which were concerned with obscene literature.

In **Freedman v. Maryland**, supra, a state statute required prior submission of movie film for review by a censorship board before public exhibition.

Obviously, the facts in the above cases are so dissimilar to the facts in the case at bar that the rationale in these cases cannot be applied here. In two of the above cases, entire stocks of certain publications were taken from distributors, without an arrest and before an adversary judicial proceeding as to their obscenity had been held.

The acquisition of samples of each allegedly obscene publication would have been sufficient for judicial determination in these cases. Thus, it was simply not necessary to confiscate all of the material at the time it was done.

In the instant case, however, there were only six statues, all of which were required for use as evidence against petitioner and were used for that purpose.

Inasmuch as petitioner was lawfully arrested, the arresting officer was authorized to seize the statues involved in the charge against petitioner. See **Haile v. Gardner**, 82 Fla. 355, 91 So. 376, 378. The seizure of the statues was an incident to a lawful arrest, and all the statues were introduced into evidence.

In the cases cited by petitioner, there were no arrests involved with respect to the seizure of the publications, simply a seizure—unnecessary for evidence purposes—of large numbers of books and magazines.

There is simply no correlation between the above cases and the situation in the case at bar.

QUESTION III

The ordinance in question is constitutional.

1. As to petitioner's Question 2.

Petitioner contends that the City of Miami ordinance involved is unconstitutional on its face under the Fourteenth Amendment with reference to the limited "appeal of prurient interest" test for determining obscenity.

Petitioner cannot be serious in this contention.

The Florida obscenity statute, which is adopted by reference by respondent's ordinance, contains terms substantially similar to the terms used in the Federal Obscenity Statute (18 U. S. Code Sec. 1461) the constitutionality of which has been upheld by this Court in **Roth v. United States**, supra.

Further, the Florida statute actually quotes the test enunciated by this Court in **Roth** for the determination of obscenity. Obviously, therefore, the statute cannot conflict with this Court's opinion in **Roth v. United States**, supra.

What petitioner apparently wants is a statute containing all of the tests ever suggested by this Court in all of the obscenity cases in which it has given opinions.

The Florida statute is actually more explicit than either the Federal Obscenity Statute or the California

Obscenity Statute, both of which were upheld as constitutional by this Court in **Roth.**

The following excerpt from this court's opinion in **Roth v. United States,** supra, is apropos:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. The constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that true copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been hand delivered to IRMA ROBBINS FEDER, RICHARD YALE FEDER, Attorneys for Petitioner, c/o ACLU of Florida, 312 Biscayne Building, Miami, Florida 33130, and to JOSEPH C. SEGOR, Attorney for Petitioner, 395 N. W. 1st Street, Miami, Florida, this 18 day of July, 1967.

JACK R. RICE, JR., City Attorney
JOHN S. LLOYD, Assistant City Attorney

By John S. Lloyd
Attorneys for Respondent

APPENDIX TO BRIEF OF RESPONDENT

UNITED STATES CODE

Title 10, Section 925. Art. 125. Sodomy

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

Title 28, Section 1257. State courts; appeal; certiorari

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

FLORIDA CONSTITUTION

Article V, Section 4 (2)

... Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute

or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

FLORIDA STATUTES

800.01 Crime against nature; punishment.

—Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be punished by imprisonment in the state prison not exceeding twenty years.

800.02 Unnatural and lascivious act.

—Whoever commits any unnatural and lascivious act with another person shall be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding six months.

CITATIONS OF NEW YORK, ILLINOIS AND CALIFORNIA

New York McKinneys Consolidated Laws of N. Y. Anno. Book 39, Part 1, Sec. 690

A person who carnally knows in any manner any animal or bird; or carnally any male or female person by the anus or by or with the mouth; or voluntarily submits to such carnal knowledge; or attempts sexual intercourse with a dead body, is guilty of sodomy and is punishable with imprisonment for not more than twenty years.

Illinois Criminal Code of 1961, Chapter 38 Sec. 11-2

Deviate sexual conduct for the purpose of this Article means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another.

California Title 9, Laws of California

Sec. 288A. Perversion; copulation with mouth; punishment

Any person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the State Prison for not exceeding 15 years....

SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 91

MARCEL FORT,

Petitioner,

vs.

THE CITY OF MIAMI,

Respondent.

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1278

MARCEL FORT,

Petitioner,

vs.

THE CITY OF MIAMI,

Respondent.

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

Respondent contends that the Florida District Court of Appeal was not the highest state court in which a decision could be had herein because the Florida Supreme Court may review by certiorari an appellate decision "in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law" (Fla. App. Rule #4. 5c [6]).

Respondent cities no such possible conflicting decision. There is no Florida decision of which petitioners are aware involving a "direct conflict. . . on the same point of law," i. e., no Florida decision holding statues not obscene (see Question 1, Petition pp. 20-25), no Florida decision holding the Miami Ordinance or similar law unconstitutional on its face (see Question 2, Petition pp. 25-27), and no Florida decision rejecting seizure and confiscation of statues without a warrant as in the case at bar (see Question 3, Petition pp. 27-30).

Respondent's totally unsubstantiated allegation that the question of the Florida Supreme Court's possible conflict jurisdiction herein "is, however, left open" is incorrect. The Florida Constitution and Florida Appellate Rules do not contemplate a useless petition for "conflict certiorari" to be filed in the Florida Supreme Court with no citation of a case upon which such certiorari could possibly be based.

Petitioner has exhausted his Florida appellate and certiorari remedies as set forth in the Petition (pp. 2-3) with pertinent supporting citations.

TESTIMONY AT TRIAL

Contrary to respondent's assertion, petitioner's "Summary of Evidence" (Petition pp. 6-20) does not contain inaccurate page citations to the Certified Transcript which accompanied the Petition for Certiorari herein. Petitioner sent respondent the required notice of docketing with a copy of the Index to the (Certified) Transcript including proper pagination in this Court. Respondent has nevertheless employed pagination of the record as it was on appeal to the Florida Circuit Court.

Respondent's "Summary of Testimony" contains several points which require comment (although petitioner does not seek to repeat its detailed Summary in the Petition). First, Sergeant Quinn's opinion as to what each statue represented in terms of sexual practices was based on invisible

genital organs. (Tr. 64-69, cf. 86). Second, Officer Matta's determination of obscenity allegedly based on "the attitude of the people," as stated by respondent was actually based on what he designated "giggling and laughing" of four twelve to eighteen year old children in the area (Tr. 82-83). Third, Officer Matta's "opinion" that the statues "appear nude" was based on no marking "one way or the other" to show whether or not clothing was being worn (Tr. 91).

Respondent's "summary" of the testimony of Professor Painter and Dr. Kapchan (see e. g. Tr. 139-140, 155-156) reveals a complete ignorance of existing advertising methods and corresponding lack of comprehension concerning this portion of expert evidence on behalf of petitioner. The advent and effect of motivational research and Freudian advertising has been discussed in numerous books including **"The Hidden Persuaders"** by Vance Packard (Pocket Book Cardinal ed., 1958, see especially pp. 70-91), **"Madison Avenue, USA"** by Martin Mayer (Pocket Book Cardinal Giant, 1959) and **"The Insolent Chariots"** by John Keats (Crest Reprint, 1959). The last named book discusses automobiles as follows:

> "Sex, of course, never need wait to be asked to raise its lovely head, and identification of the automobile as a sexual symbol was an instantaneous reflex action for America. . .
> (p. 52)

> "Detroit was certainly not blind to any of this, and responded not only by putting a dream girl in every advertisement of a dreamboat, but also by building deliberate sexual symbols into automobile designs in the expectation that the car's outward shape would precisely represent the shape of the customer's sexual pecularity. It is not sheer accident, for example, that most manufacturers put penial geegaws on the hoods of their cars,

> or that Cadillac's stylists speak of the 'bosoms' on their bumpers, or that Buick came up with its famous ring peirced by a flying phallus, or that Madison Avenue was quick to applaud the Edsel for its 'vaginal look', or that so many Detroit stylists lavish so much attention on the rear ends of automobiles..."
> (p. 53)

The point is that blatantly suggestive commercial practices[1] emphasizing the potential sexual symbolism of any line and any circle render "highly symbolic and abstract... works of art of considerable complexity and depth" unlikely to appeal to prurient interest (Tr. 157).

When Dr. Kapchan admitted candidly that the statues "could" influence the sex urge of not only adults but children, trial counsel for the City of Miami stated, "[i]n other words,... [they are] prurient" (Tr. 165), and thus equated sex with pornography or obscenity. Dr. Kapchan, noting the scientific fact that "sexual arousal" has been observed "in infants of two months" (Tr. 164), then explained his obvious conclusion that the statues could influence sexual urges in "healthy channels as well as abnormal... [ones depending] on the total concept of the individual" (Tr. 165-166).

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[1]Verbal advertising is similarly suggestive. A generation ago "so round, so firm, so fully packed, so free and easy on the draw" characterized one brand of cigarettes. A recent TV jingle about another brand cautions that "it's not how long you make it, it's how you make it long." No implication of art is found in the verse or jingle.

UNCONSTITUTIONAL APPLICATION OF ORDINANCE RE OBSCENITY (Question 1)

Respondent takes the position that the statues are obcene because (1) they portray unnnatural sex acts forbidden by the criminal law, thus affronting contemporary community standards, and (2) none of this Court's decisions upon which petitioner relies deals with statues as distinguished from books and movies, leastwise with statues "crudely constructed in fiberglass."

Petitioner denies that the statues represent perverted sexual acts except insofar as the eye of the beholder, particularly if "trained" by modern advertising methods, so endows the structural designs in space. The beholder seeking "the emotion of love" or the promotion of "normal love," as intended by the sculptor (Tr. 183), as well as the beholder with no "preconceived idea" (Tr. 117-118) may "see" objects of a religious, acrobatic, entomological or other nature, objects unrelated to the criminal law.[2]

While it is true that petitioner has been unable to find any relevant decision of this Court dealing per se with statues, the rationale of the cases cited in the Petition would seem to apply equally to all forms of artistic expression. The case at bar has potential significance beyond the particular statues involved in that the inclusion of sculpture within the First Amendment has apparently occurred only through dicta in Mr. Justice Douglas' dissenting opinion in **Poe v. Ullman**, 376 U. S. 497, 514, 81 S. Ct. 1752, 1761, 6 L. Ed. 2d 989, 1002. In any event, respondent's conclusion that the statues in question are "crudely constructed"[3]

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[2]Representation of an act violating criminal law does not, of course, automatically yield obscenity. Nudity is prohibited in many places where unclothed statues are quite permissible, i.e., museums and public parks. Note, also, artistic efforts dealing with violence.

[3]Respondent's reference to petitioner's "extremely crude application of fiberglass" in sincerely disputed by petitioner's counsel who are singularly unable, after repeated effort, to construct interesting castles in the sand.

appears valid in terms of the "smoothness" of automobile geegaws, a validity irrelevant to artistic merit. Nor is the statues' material, fiberglass, any indication of absence of social value. Art does not encompass only antiques. Similarly, whether or not the statues are "entirely successful" structurally has no bearing on the issue. Surely our Constitution does not protect only "good" art, whatever that may be.

Lastly, respondent contends that "[t]he public display of the statues was the culmination of the offense," relying on **Ginzburg v. United States,** 383 U. S. 463, 86 S. Ct. 492, 16 L. Ed. 2d 31. But what evidence of pandering, i.e., "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers," was presented in the case at bar? The sole advertisement concerning the 6 statues in petitioner's backyard, 50 or 75 feet from the highway, was a sign at either end stating "Art for Sale. $25 and up" (Tr. 44). The record reveals no law against selling art from one's backyard. The only "salacious cast" placed on the setting was done by respondent.

As in the very recent case of **Redrup v. New York,** _____U. S._____, _____S. Ct._____, 18 L. Ed. 2d 515, the case at bar does not involve a law aimed only at children, an unavoidable assault upon privacy, or evidence of pandering.

Petitioner urges, again as in the **Redrup** case, supra, that under all of the constitutional views presently taken by the Honorable Justices of this Court, the statues in the case at bar are "protected by the First and Fourteenth Amendments from governmental suppression. . ."

UNCONSTITUTIONALITY OF ORDINANCE RE OBSCENITY (Question 2)

Respondent defends the Miami Ordinance's sole and exclusive appeal-to-prurient-interest test as "actually more explicit than either the Federal Obscenity Statute or the

California Statute, both of which were upheld as constitutional by this Court in **Roth** [354 U. S. at 497, 77 S. Ct. at 1306, 1 L. Ed. 2d at 1503-1504, footnotes 1 and 2]."

The Miami Ordinance, § 10, is more explicit in the sense that neither the Federal nor the California statute referred to gives any test or definition of obscenity. The problem arises because the Miami Ordinance is explicitly wrong. Appeal-to-prurient-interest, standing alone, does not establish obscenity left unprotected by the Constitution. See Petition, pp. 25-27, and **Redrup v. New York,** .....U. S....., ...S. Ct....., 18 L. Ed. 2d 515.

UNCONSTITUTIONAL APPLICATION AND UNCONSTITUTIONALITY OF ORDINANCE RE SEIZURE OF STATUES (Question 3)

Respondent contends that the seizure and confiscation of the statues was constitutional as "it was incident to a lawful arrest, and all the statues were introduced into evidence." Petitioner submits that this Court's decisions requiring a warrant, notice and judicial adversary proceeding to determine the question of obscenity prior to seizure of the material (see Petition, pp. 27-30) are not rendered inapplicable by petitioner's arrest, also without a warrant, and particularly so when said arrest was based solely on the allegedly obscene statues. If the contrary be true, then the mere "judment of the police officer" held constitutionally insufficient to permit seizure of material as obscene in **Marcus v. Search Warrants of Property,** 367 U. S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 would somehow meet the requirements of the First and Fourteenth Amendments so long as he also used his mere "judment" to arrest the owner/ possessor/ distributor/etc. of the material for such ownership/possession/distribution/etc.

As far as use of the statues for evidentiary purposes is concerned, it should be noted that petitioner never evinced

any intention to hide or destroy the statues. Such intention belongs to the respondent-City. Moreover, this Court itself has indicated that photographs of the statues are all that is necessary for adjudication of the issue of obscenity.[4]

In conclusion, petitioner takes the position that the seizure and confiscation provision of the Miami Ordinance as well as its application in the case at bar is unconstitutional in spite of the fact that the proceeding was criminal and in personam. See **Redrup v. New York,** .....U. S.....,.....S. Ct.....,, 18 L. Ed. 2d 515.

CONCLUSION

For the foregoing reasons as well as those set forth in petitioner's Petition for a Writ of Certiorari, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted, the decision below reversed and the six statues returned to petitioner.

Respectfully submitted,

By .....

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[4]Petitioner has abandoned the plan to forward 3 of the statues to this Court (see Petition, p. 6, footnote 2) pursuant to telephone calls from the Clerk of this Court informing counsel that one of the Honorable Justices of this Court requested that the statues not be sent to Washington, D. C.

CERTIFICATE OF SERVICE

I, IRMA ROBBINS FEDER, Counsel for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 22, 1967. I served copies of the foregoing Petitioner's Reply (to Response to Petition for a Writ of Certiorari) on Respondent by mailing a copy thereof in a duly addressed envelope to JACK R. RICE, JR., City Attorney, attention JOHN G. THOMAS and/or JOHN LLOYD, Assistant City Attorneys, 65 S. W. 1st Street, Miami, Florida 33130.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1278

MARCEL FORT,

Petitioner,

vs.

THE CITY OF MIAMI,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that this Court grant rehearing of its Order of October 23, 1967 denying the petition for a writ of certiorari (Mr. Justice Stewart, with whom Mr. Justice Black and Mr. Justice Douglas joined, dissenting), 36 L.W. 3173, and that a writ of certiorari issue to review the judgment of the District Court of Appeal for the Third District of Florida in the above-entitled case as prayed for in the petition of April 12, 1967, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. RESPONDENT-CITY'S ARGUMENT THAT "CONFLICT-JURISDICTION" OF THE FLORIDA SUPREME COURT DEPRIVES THIS COURT OF JURISDICTION UNDER 28 U.S.C. §1257(3) BECAUSE PETITIONER FAILED TO EXHAUST HIS STATE REMEDIES (BRIEF OF RESPONDENT IN OPPOSITION, PP. 9-11) IS TANTAMOUNT TO A DENIAL OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

As Mr. Justice Brandeis wrote in **Brinkerhoff-Faris Trust & Savings Co. v. Hill**, 281 U.S. 673, 682, 50 S.Ct. 451, 454, 74 L.Ed. 1107, 1114:

> "* * * while it is for the state courts to determine the adjective as well as the substantive law of the state, they must in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Or as stated in **Davis v. Wechsler**, 263 U.S. 22, 24, 44 S.Ct. 13, 14, 68 L.Ed. 143, 145:

"Whatever springes the state may set for those

> who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

As more recently held by this Court in **NAACP v. Alabama**, 357 U.S. 449, 458, 78 S.Ct. 1163, 1169, 2 L.Ed 2d 1488, 1497:

> "Novelty in procedural requirements cannot be used to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."

Petitioner did not avoid or evade review by the Florida Supreme Court, as implied by respondent, but instead sought full review of all three questions[1] presented to this Court (Petition for Certiorari, p. 3) in each and every state court available to petitioner (Petition for Certiorari, pp. 16-20)[2] and would have welcomed a favorable decision below.

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[1]Question 1 raises the unconstitutional application of the Miami Ordinance in that the statues are not obscene; Question 2 raises the unconstitutionality of the Miami Ordinance itself in limiting the test for obscenity solely to "appeal to prurient interest"; Question 3 raises the unconstitutionality of the Miami Ordinance both on its face and as applied in the case at bar in terms of prior restraint.

[2]The 44 pp. Brief of Appellant in the circuit court and the 39 pp. Brief of Petitioner in the district court of appeal, as well as the extensive oral arguments presented in both courts, were substantively (and in great part precisely) the same as the Petition for Certiorari filed in this Court insofar as the three Questions Presented and Arguments concerning Federal constitutional law (with the exception of cases decided after the briefs were filed). Respondent's 6 page brief in the circuit court cited only one case, Roth v. United States, 354 U. S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498. Respondent filed no brief in the district court of appeal.

Counsel would have particularly welcomed a favorable decision by the Florida Supreme Court, but was unable to reach said court in spite of all possible efforts made, under applicable Florida appellate jurisdictional law.

Although several aspects of Florida appellate law present difficulties even for highly able and conscientious counsel, the correct route to be taken at each step of the case at bar was explicitly and clearly set forth by the opinions of the Florida Supreme Court in the **Dresner v. City of Tallahassee** cases, Fla. 1961, 134 So. 2d 228 and Fla. 1964, 164 So. 2d 208. Counsel studied these "first" and "second" **Dresner** opinions of the highest court of the state repeatedly and in depth during the entire course of the case at bar.

In the first place, **direct appeal** from the trial court to the Florida Supreme Court is allowed only if (1) the trial court passes directly on the validity of a state statute, or (2) construes a controlling provision of the state or federal constitution, first **Dresner** opinion, 134 So. 2d at 228. In the case at bar no such direct appeal could be taken: as far as (1) above, the municipal court refused petitioner's request to pass upon the validity of the law under which petitioner was charged (Petition for Certiorari, 18, Transcript pp. 194-195) and "[f]or purposes of determining the jurisdiction of this [Florida Supreme] Court, a municipal ordinance cannot be classified as a state statute."[3] **Dresner,** 134 So. 2d at 229-230,

[3]The fortuitous circumstance of petitioner's arrest and conviction under the Miami Ordinance (City of Miami Code Ch. 43 §38) rather than under the Florida State Statute it adopts (Fla. St. §847.011) was not subject to modification by petitioner.

citing **Armstrong v. City of Tampa**, Fla. 1958, 106 So. 2d 407); as far as (2) above, the municipal court obviously did not construe any controlling state or federal constitutional provision (Petition for Certiorari, p. 18, Transcript, pp. 194-195, see also the **Armstrong** case, **supra**, distinguishing "construction" from "application", the municipal court having even refused to apply any constitutional provision in the case at bar!).[4]

In the second place, direct appeal from the circuit court to the Florida Supreme Court is allowed only if the circuit court (1) acts as a "trial court" and (2) construes (rather than applies) a controlling federal or state constitutional provision, second **Dresner** opinion, 164 So. 2d at 211. Neither of the two conditions was present in the case at bar, leastwise both as required by Florida law. The circuit court acted as an appellate court and its one sentence affirmance (Petition for Certiorari, App. B, Transcript, p. 202) construed **nothing.**

In the third place, the second **Dresner** opinion, 164 So. 2d 208 at 210 stated that appeal to the circuit court followed by a petition for common-law certiorari in the district court of appeal is the correct route to be taken when the "trial court" does not take action permitting direct appeal to the Florida Supreme Court. In the case at bar, petitioner clearly had to take this route, as he did, under Florida law.

In the fourth place, certiorari to the Florida Supreme Court following denial of common-law certiorari by the

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[4]Note also that it is *only "conceivably* [that] a municipal court could be considered as a 'trial court' ", Dresner, 134 So. 2d at 230.

district court of appeal is allowed only if one of three requirements is met: (1) if the district court of appeal's decision conflicts with a decision of another district court of appeal or of the Florida Supreme Court on the same point of law, (2) if the district court of appeal's decision initially construes a controlling federal or state constitutional provision, or (3) if the district court of appeal's decision initially passes upon the validity of a state statute, second **Dresner** opinion, 164 So. 2d at 212-213. In the case at bar, the district court of appeal's one sentence denial of certiorari (1) did not present the required "decisional conflict," as discussed previously, (2) did not construe **anything**, and (3) did not pass on the validity of the law under which petitioner was convicted, leastwise upon the validity of a state statute (rather than a municipal ordinance) as required by applicable law.

In **Callendar v. State**, Fla. 1956, 181 So. 2d 529 (the sole case cited by respondent in support of its "conflict jurisdiction" argument), the Florida Supreme Court reaffirmed the appellate jurisdictional law set forth in its second **Dresner** opinion, **supra**, and returned the mandates of **this** (United States Supreme) Court on the ground that the Florida Supreme Court had **no appeal or certiorari jurisdiction** to review the (First) district court of appeal's orders denying certiorari. **This** Court thereupon recalled its mandates, vacated its prior judgments, **granted certiorari to the Florida (First) district court of appeal**, and reversed its judgment, 383 U.S. 270, 86 S.Ct. 924, 15 L.Ed. 2d 749, after which the Florida district court of appeal complied therewith, Fla. App. 1966, 184 So. 2d 656.

Present-day use of the second **Dresner** opinion, 164 So. 2d 208, as well as the Florida (Second) district court of appeal's feelings toward the "dubious . . . honor" bestowed upon Florida district courts of appeal by the Florida Supreme Court in the **Dresner** case, may be found in **Awtrey v. City of St. Petersburg**, Fla. App. 1967, 193 So. 2d 468.

Petitioner could not in good faith have filed a petition for "conflict certiorari" in the Florida Supreme Court, accompanied by supporting portions of the record and a brief relating solely to jurisdiction, because research revealed **no** decision of another district court of appeal or of the Florida Supreme Court in direct conflict on the same point of law.[5]

Petitioner does not and cannot herein assert that the Florida appellate jurisdictional rules, though at times complex, deprive petitioner of due process of law. Petitioner does and must reassert his total (though unsuccessful) exhaustion of state remedies as enunciated by the Florida Supreme Court in the **Dresner** opinions, **supra**, and his consequent proper invocation of certiorari review by this court.

Whether respondent's fallacious "conflict jurisdiction" argument reflects unfamiliarity with controlling

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[5]Florida Appellate Rule 4.5c(6), as amended, and effective during the case at bar (printed in toto in Appendix A, infra), requires the petition for "conflict certiorari" to be accompanied by those parts of the record and a brief "relating only to jurisdiction of the [Florida Supreme] Court." Until and unless certiorari is granted on the *jurisdictional* record and briefs, no party may present argument, in briefs or otherwise, "on the merits of the petition."

Florida law or instead "overzealousness" sometimes overtaking state and city attorneys is unknown to petitioner and irrelevant. In view of (1) the **Dresner** opinions, **supra,** (2) respondent's failure to cite any case whatsoever yielding the required "decisional-conflict," (3) petitioner's inability to locate such a case, and (4) apparent reliance by at least one member of this Court on respondent's jurisdictional argument, petitioner is compelled to assert that respondent has unjustifiably, but successfully,* challenged petitioner's right to certiorari review of the judgment below by this Court, review of significant constitutional questions (or of any one of them) raised by petitioner's criminal trial, conviction and sentence.

Petitioner had no "real opportunity" to secure Florida Supreme Court review of the case at bar, see **Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra.** Respondent's "springes . . . under the name of local practice" must not be permitted to defeat petitioner's appropriate reliance on Federal Constitutional rights, **Davis v. Wechsler, supra.** Having justifiably relied upon the **Dresner** opinions, **supra,** and having properly sought "vindication in state courts of . . . [his] federal constitutional rights," petitioner must characterize as a denial of due process of law respondent's evidently successful use of "[n]ovelty in procedural requirements . . . to thwart review in this Court . . . ," **NAACP v. Alabama, supra.** Petitioner has exhausted his state remedies; three levels of Florida

*In both Tralins vs. Gerstein, 378 U.S. 576, 84 S.Ct. 1903, 12 L.Ed. 2d 1033, and Grove Press v. Gerstein, 378 U.S. 577, 84 S.Ct. 1909, 12 L.Ed. 2d 1035, this Court granted certiorari and summarily reversed the judgments below in spite of respondent-State Attorney's Briefs in Opposition raising similarly fallacious failure-to-exhaust-state-remedies-arguments, arguments thus not being prejudicial to petitioners, unlike in the case at bar.

courts is "enough," even if the respondent should "dissent."

2. PETITIONER HAS A CONSTITUTIONAL RIGHT NOT TO BE TRIED, CONVICTED, AND SENTENCED UNDER AN UNCONSTITUTIONAL CITY ORDINANCE DEFINING OBSCENITY SOLELY IN TERMS OF THE "APPEAL TO PRURIENT INTEREST" TEST, A CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW INVOLVED IN QUESTION 2 PRESENTED BY THE PETITION FOR CERTIORARI, (PP. 3, 25-27)[6] AND A CONSTITUTIONAL RIGHT TOTALLY INDEPENDENT OF THE STATUES' OBSCENITY OR LACK THEREOF.

Even if petitioner's statues are **not** entitled to the constitutional protection extended to freedom of expression,[7] nevertheless, petitioner is entitled to prosecution and conviction for knowingly-offering-obscene-

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[6]While challenging the Miami Ordinance's constitutionality in this respect in the Petition, petitioner did not then or in his reply brief urge *the due-process-denial* resulting from his conviction, etc. under an unconstitutional ordinance. Such substantial ground for reversal of the judgment below was not previously argued herein, though available to petitioner.

[7]If a majority of this Court deems the statues obscene or deems their setting evidence of pandering, the statutes are not entitled to the "free-speech" guarantees of the First and Fourteenth Amendments (c.f. Question 1, P. 3, 20-25). This Court's decisions in Potomac News Co. v. United States, 36 L.W. 3170 (#164), Central Magazine Sales Ltd. v. United States, 36 L.W. 3170 (#368), and Conner v. City of Hammond, 36 L.W. 3170 (#259), all three handed down the same day as denial of certiorari in the case at bar, and all three granting certiorari and summarily reversing the judgments below on the sole ground of lack of obscenity of the material involved (i.e., all three citing Redrup v. New York, ... U.S. ....., ... S.Ct. ....., 18 L.Ed. 2d 515), suggest a possible opinion held by a majority of this Court to the effect that the statues in the case at bar are obscene.

statues-for-sale-in-his-backyard under a constitutional law. "Due process of law" does not permit an arrest, trial, conviction, fine (or 40 days' imprisonment) and imminent destruction of personal property on the basis of a constitutionally invalid city ordinance. "Justice under law" does not permit criminal prosecution and punishment under an unconstitutional law—no matter how obscene the material upon which the criminal action is based. Conviction by "kangaroo court" or under unconstitutional ordinance is equally abhorrent to our system of justice.

As stated by Mr. Justice Fortas **In the Matter of the Application of Gault**, ___ U.S. ___, 35 L. W. 4399, 4405:

> "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social contract which defines the rights of the individual and delineates the powers which the State may exercise."

Assuming arguendo that the statues are obscene in themselves or in their setting, nevertheless such opinion does not in one whit diminish the vital significance of the second question presented, namely, the constitutionality of the Miami Ordinance with its exclusive "appeal to prurient interest" test for determining obscenity.[8]

Petitioner challenged the constitutionality of the Miami Ordinance, under which criminal proceedings against him were successfully brought and prosecuted from his

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[8] A fortiori, the Miami Ordinance excludes the "patently offensive" and "utterly without redeeming social importance" tests.

arrest on August 11, 1965 to date, throughout three Florida trial and appellate courts, petitioner actively pursued and exhausted his state remedies without any specific judicial ruling on the constitutional sufficiency of the exclusive "appeal to prurient interest" test, leastwise a favorable one,[9] and petitioner made timely request of this Court to grant certiorari and reverse the judgment below on the ground, inter alia, of unconstitutionality of the Miami penal Ordinance.[10] It does not seem unreasonable to expect that petitioner's constitutional right to due process of law includes an authoritative ruling by this Court upon the constitutional validity of the Miami Ordinance in view of opinions of various Justices of this Court in Jacobellis v. Ohio, 378 U.S. 184, 84 S. Ct. 1676, 12 L.Ed.

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[9]See detailed exposition of proceedings below in the prior "reason" concerning respondent's fallacious "conflict-jurisdiction" argument, supra.

[10]Counsel for petitioner in the case at bar also participated in the Tralins v. Gerstein and Grove Press v. Gerstein cases, supra, and were instrumental in the eventual decision to attack the banning of "Pleasure Was My Business" and "Tropic of Cancer" on grounds *not* involving the unconstitutionality of the state statute since the statute complied with the then-existing law as set forth in Roth v. United States, supra. This Court's opinions in Jacobellis v. Ohio, 378 U.S. 184, 84 S. Ct. 1676, 12 L.Ed. 2d 793, Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed. 2d 1, Mishkin v. New York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed. 2d 56, Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed. 2d 31, revealed significant post-Roth changes. Consequently, petitioner in the case at bar challenged the constitutionality of the "appeal-to-prurient-interest" test set forth in the Miami Ordinance at the earliest possible moment, i.e., at trial herein. Petitioner cited Jacobellis v. Ohio as well as Roth v. United States to all three Florida courts involved, and petitioner relied on the Memoirs, Mishkin and Ginzburg language as soon as the opinions were handed down on March 21, 1966, including these three cases in the brief and oral argument before the Florida district court of appeal.

2d 793, and "the prevailing opinion by Mr. Justice Brennan" in **Memoirs v. Massachusetts**, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed. 2d 1.[11]

Petitioner respectfully suggests that the question involved is important enough that fourteen more separate opinions[12] explaining the present positions taken by the Justices of this Court on the proper constitutional tests for determining obscenity is preferable to silence on the issue.

The entire problem of obscenity and constitutional law, freedom of the individual and societal standards of decency, artistic expression and public morality, etc., may indeed not be capable of solution today or in the near future, no matter how much time, energy and skill this Court, other courts, legislatures, executives, scholars, and citizens, etc. expend. But this Court may aid in solution of the problem by opinions setting forth relevant scientific, sociological and legal information, analysis, and conclusions.

Petitioner respectfully urges that this Court reconsider "coming to grips"[13] with the issue of his criminal conviction under the Miami Ordinance defining obscenity only in terms of "appeal to prurient interest."

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[11]See Dissenting Opinion in the case at bar, fn. 4.

[12]See *Ginzburg v. U. S.*, supra, 383 U.S. at 480, 481, 86 S.Ct. at 952, 16 L.Ed. 2d at 44 (dissenting opinion of Mr. Justice Black)

[13]Redrup v. United States, ... U.S. ....., ... S.Ct. ....., 18 L.Ed. 2d 515. (dissenting opinion of Mr. Justice Harlan).

3. A NEW FLORIDA STATE OBSCENITY STATUTE[14] EFFECTIVE OCTOBER 1, 1967, PROHIBITS THE KNOWING POSSESSION OF OBSCENE STATUES FOR SALE TO ANYONE UNDER 18 AS WELL AS THE SHOWING OF SUCH MATERIAL TO SUCH PERSON, AND SETS FORTH NO "APPEAL TO PRURIENT INTEREST" TEST FOR DETERMINING OBSCENITY, SUCH NEW STATUTE BEING AN INTERVENING CIRCUMSTANCE OF SUBSTANTIAL EFFECT IN THE CASE AT BAR.

Since the new statute (unlike the Miami Ordinance adopting Fla.Stat. §847.011, subsection 10, involved in the case at bar) does not include an "appeal to prurient interest" test for defining "obscene," favorable action upon petitioner's request for a holding by this Court that the Miami Ordinance is unconstitutional (Question 2, Petition for Certiorari, pp. 3, 25-27) would NOW leave the State of Florida free to proceed under the new statute. Since the new statute, unlike the Miami Ordinance, contains no "appeal to prurient interest" test for determining what is "obscene," the new statute permits the Florida Courts to apply all tests required by this Court's present decisions (i.e., the "appeal to prurient interest," "customary candor," and "redeeming social importance" tests (**Memoirs v. Massachusetts, supra**) or by this Court's future decisions, an application expressly forbidden the municipal court in the case at bar by the Miami Ordinance.

Petitioner cannot and does not, at this posture of this case, take a position on the constitutionality of the new

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[14]Printed in toto in Appendix B: Chapter 67-153 (Florida Session Law Service suppl. Fla. Stat. Ann. [1967, No. 2], "Laws 1967-41st Regular Legislative Session," pp. 233-235.

statute. But petitioner can state that the new statute permits a determination of what is "obscene" under whatever constitutional tests are set forth in this Court's opinions now or hereafter, and would avoid the issue presented by Question 2 in the case at bar.

CONCLUSION

For the reasons set forth above (as well as in the Petition for Certiorari and Petitioner's Reply to Response heretofore filed), it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the District Court of Appeal for the Third District of Florida.

Respectfully submitted,

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Of Counsel

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that the foregoing Petition for Rehearing is presented in good faith and not for delay, and further certify that the Petition for Rehearing is restricted to the grounds specified in Rule 58 of the Rules of this Court.

IRMA ROBBINS FEDER
RICHARD YALE FEDER
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, IRMA ROBBINS FEDER, Counsel for Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on November 13, 1967, I served copies of the foregoing Petition for Rehearing on the Respondent by mailing a copy thereof in a duly addressed envelope to JACK R. RICE, City Attorney, attention JOHN G. THOMAS and/or JOHN LLOYD, Assistant City Attorneys, 65 S.W. 1st Street, Miami, Florida 33130.

IRMA ROBBINS FEDER
Attorney for Petitioner

APPENDIX A

(Florida Appellate Rules, as amended effective March 31, 1966, 32 Fla. Stat. Ann.)

Florida Appellate Rule 4.5c (6)

From District Court to Supreme Court. Where any decision of a district court of appeal (1) affects a class of constitutional or state officers, or (2) passes upon a question certified by such district court to be of great public interest, or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decision.

The petition for certiorari under this rule shall be filed in the Supreme Court within 60 days from the rendition of the order, decision or judgment of the district court of appeal. The petition shall set forth briefly and clearly the grounds for invoking jurisdiction of the Supreme Court and the facts relied upon for the issuance of the writ. Unless the district court shall otherwise direct for good cause shown after notice and hearing, a petition for certiorari filed in the Supreme Court within 15 days from the date of the filing of the order, decision or judgment sought to be reviewed or within 15 days from the date of the disposition of a petition for rehearing shall automatically stay further proceedings in the district court and the trial court until the disposition of said petition by the Supreme Court; otherwise such petition for certiorari shall operate as a stay of such proceedings only upon the order of the Supreme Court or the Chief Justice after due notice to the adverse party.

Only so much of the record as shall be necessary to show jurisdiction in the Supreme Court shall be attached to or filed with the petition, and it may be in the form of conformed copies and need not be certified, except when a certificate of great public interest is made by the district court of appeal.

Copy of petition with certificate of filing the same in the Supreme Court shall be filed in the district court of appeal.

Copy of petition, and of the supporting portions of the record and brief relating only to jurisdiction of the Court, shall be served on the respondent or his attorney on or before the time petition is filed with the Clerk of the Supreme Court. Respondent shall file a reply brief in opposition, on the sole issue of jurisdiction, and serve copy thereof upon the petitioner within 10 days after he has been served with copy of the petition, supporting portions of the record and brief. Such reply brief may be supported by copies of additional portions of the record below which need not be verified, but which shall be filed and served with the reply brief.

The Supreme Court shall consider the petition, supporting record or portions thereof and the briefs on jurisdiction, without oral argument unless otherwise directed, and if the Court determines that it has jurisdiction, the said petition shall be granted; otherwise the same shall be denied or dismissed.

If granted, a copy of the order granting the petition shall be forwarded forthwith by the clerk to the district court of appeal and 45 days after the receipt of said order

or sooner by stipulation of parties (or within such other time as the Court may direct) the original record in the district court shall be forwarded by that court to the Clerk of the Supreme Court. Copies of said order shall be served by the Clerk of the Supreme Court upon counsel of record for the respective parties, and the cause shall be set for oral argument on the merits of the petition. Counsel for the petitioner shall file his brief on the merits and serve a copy thereof upon the respondent within 25 days from the rendition of the order granting certiorari. The respondent shall file his brief in opposition and serve a copy thereof upon petitioner within 15 days after he has been served with a copy of the petitioner's brief, and petitioner shall have 5 days thereafter within which to file and serve a reply brief.

When jurisdiction for certiorari is based on a certificate of a district court that the decision passes upon a question of great public interest, no preliminary brief as to jurisdiction need be filed, and upon the filing of the petition and such a certificate of the district court, an order granting certiorari may be entered and thereupon the matter shall proceed as outlined in the preceding paragraph.

When the case is finally disposed of by the Supreme Court, the Court may order a certified copy of such record, or of the part thereof which the Court deems necessary, filed in the Supreme Court before the original record is returned to the district court of appeal and shall assess the costs thereof in such order.

APPENDIX B

(New Florida statute, effective October 1, 1967, Florida Session Law Service supplementing Fla. Stat. Ann. [1967, No. 2], "Laws 1967 41st. Legislative Regular Session", at pp. 233-235)

OBSCENE, ETC. PUBLICATIONS—FELONY, EXEMPTIONS
CHAPTER 67-153
SENATE BILL NO. 226

An Act relating to obscene, lewd, lascivious, filthy, indecent, immoral, sadistic or masochistic publications; making it a felony to knowingly distribute such publications to persons under eighteen (18) years of age; prescribing penalties for the violation of this act; providing procedures for the criminal prosecution of violators; providing procedures for civil actions to restrain continued violations; exempting the exhibition of certain motion pictures; providing an effective date.

WHEREAS, it is hereby determined and declared that the sale, distribution and dissemination of publications, materials, matters, articles and things of the character described in this act, to individuals under the age of eighteen (18) years, is a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth, and a clear and present danger to the people of this state; NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1.

A person who knowingly sells, offers for sale, advertises for sale, lends, gives away, shows, transmits or distributes to any person under the age of eighteen (18) years, or who knowingly has in his possession, custody or control with intent to sell, offer for sale, lend, give away, show, transmit, or distribute to any individual under the age of eighteen (18) years, any book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any character which may or may not require mechanical or other means to be transmitted into auditory, visual, or sensory representations or portrayals, the cover or content of which exploits, is devoted to, or is principally made up of descriptions or portrayals of illicit sex or sexual immorality or perversion or is obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic, or consists of pictures of nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion, or manifestly tends to corrupt the morals of youth, or any article or instrument of indecent or immoral use; or who in any manner knowingly employs, procures, uses or permits any person to do or assist in doing, any act or anything mentioned above, shall be guilty of a felony upon conviction thereof and shall be punished by imprisonment in the state prison not exceeding five (5) years or in the county jail not exceeding one (1) year or by fine not exceeding ten thousand dollars ($10,000.00), or both such fine and imprisonment.

Section 2.

Every act, thing, or transaction forbidden by this act shall constitute a separate offense and shall be punishable as such.

Section 3.

Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this act may be made by showing that at the time such act was committed or conduct engaged in he had actual knowledge of the content or character of the material, matter, article or thing possessed or otherwise dealt with or involved, or by showing facts and circumstances from which it may fairly be inferred that he had such knowledge, or by showing that he had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such content or character.

Section 4.

(a) The circuit court has jurisdiction to enjoin a violation of this act upon complaint filed by the state attorney, county solicitor, or county prosecuting attorney in the name of the state upon the relation of such state attorney, county solicitor, or county prosecuting attorney.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person complained of until final hearing or further order of the court. Whenever the relator state attorney, county solicitor, or county prosecuting attorney shall request a judge of said court to set a hearing upon an

application for such a restraining order, such judge shall set such hearing for a time within three (3) days after the making of such request. No such order shall be made unless such judge shall be satisfied that sufficient notice of the application therefor has been given to the party restrained of the time when and place where the application for such restraining order is to be made.

(c) The person sought to be enjoined shall be entitled to a trial of the issues within one (1) day after joinder of issue and a decision shall be rendered by the court within two (2) days of the conclusion of the trial.

(d) In the event that a final decree of injunction is entered, it shall contain a provision directing the defendant having the possession, custody, or control of the materials, matters, articles, or things affected by the injunction to surrender the same to the sheriff and requiring the sheriff to seize and destroy the same. The sheriff shall file a certificate of his compliance.

(e) In any action brought as provided in this section, no bond or undertaking shall be required of the state or the state attorney or county solicitor or county prosecuting attorney before the issuance of a restraining order provided for by paragraph (b) of this section, and there shall be no liability on the part of the state or the state attorney or the county solicitor or the county prosecuting attorney for costs or for damages sustained by reason of such restraining order in any case where a final decree is rendered in favor of the person sought to be enjoined.

(f) Every person who has possession, custody, or control of, or otherwise deals with any of the materials, matters, articles, or things described in this act, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

Section 5.

The several sheriffs, constables, state attorneys, county solicitors, and county prosecuting attorneys shall vigorously enforce this act within their respective jurisdictions.

Section 6.

This act shall not apply to the exhibition of motion picture films permitted by section 521.02, Florida Statutes.

Section 7.

For the purposes of this act, the word person includes individuals, firms, associations, corporations, and all other groups and combinations.

Section 8.

If any provision or part of this act should be held invalid, the remainder of the act shall not be affected by such holding.

Section 9. This act shall take effect on October 1, 1967.

Approved by the Governor June 7, 1967.

Filed in Office Secretary of State June 7, 1967.